Freeing a Child for Adoption

CHAPTER 2

In this chapter . . .

The first step in the adoption process is ensuring the child is freed for adoption. Freeing a child for adoption is a complex process that depends upon numerous factors within each case. This chapter contains discussion of how an adoptee may be released for adoption, how consent to adoption occurs, and how to terminate parental rights in order to free a child for adoption.

In freeing a child for adoption, one of the first matters to be determined is the identity of the child's father. Although this chapter discusses terminating a father's parental rights, it does not cover identifying a father. Chapter 3 focuses on identifying fathers. This chapter does not address jurisdictional issues. An in-depth discussion of jurisdiction and venue can be found in Chapter 4. It also does not address cases involving an "Indian child." An in-depth discussion of the Indian Child Welfare Act can be found in Chapter 11.

2.1 Release of Parental Rights

MCL 710.22(s) provides:

> "'Release' means a document in which all parental rights over a specific child are voluntarily relinquished to the [Family Independence Agency] or a child placing agency."

Parental rights constitute a fundamental liberty interest protected by the Fourteenth Amendment to the United States Constitution. *In re Meyers*, 131 Mich App 160, 165 (1983) and *Reist v Bay Circuit Judge*, 396 Mich 326, 341 (1976).

The release and revocation of release provisions of the Adoption Code do not violate the Due Process Clause of the Fourteenth Amendment. *In re Meyers*, 131 Mich App 160, 165-66 (1983).

*See Section 2.6 for more information on consent.

A release may *only* be given to a child placing agency or to the Family Independence Agency (FIA). MCL 710.28(5). A parent may not release his or her parental rights to the court or to a third party but may consent to adoption by a third party.*

Interested parties to a release are: 1) the adoptee if he or she is over the age of five, 2) the FIA or the child placing agency that the child is being released to, and 3) the person executing the release. MCL 710.24a(3).

The court may also require additional parties. MCL 710.24a(6) provides that "[i]n the interest of justice, the court may require additional parties to be served."

A. Persons Authorized to Execute a Release

1. Parent

Pursuant to MCL 710.28(1)(a), a parent may release his or her parental rights to his or her child. There are three exceptions to this rule:

- the parent's parental rights to the child have already been terminated,
- a guardian has been appointed for the child, or
- a guardian has been appointed for the parent.

Attached in Appendix B is the SCAO form "Release of Child by Parent."

Prior to a release being given by a parent, a FIA representative must tell the parent what child placing agencies serve the county. At a parent's request, the FIA must refer that parent to another agency. MCL 710.28(6).

MCL 710.55a(2) provides:

> "In a direct placement* or agency placement adoption, if the minor parent of a child who is a potential adoptee is not represented by an attorney, the adoption attorney or child placing agency that is providing adoption services involving that minor parent shall provide the minor parent with an opportunity to discuss with an attorney who is not associated with the adoption attorney or child placing agency the legal ramifications of a consent or release, or of the termination of parental rights, before the execution of a consent or release or the termination of parental rights."

*For information on direct placement adoptions, see Section 8.1.

If the parent is a minor and has not been emancipated, then the parent's release must also be accompanied by a release from his or her parent, guardian, or guardian ad litem. MCL 710.28(2).

Note: A parent is not entitled to court-appointed counsel for a voluntary release of parental rights. See *In re Jackson,* 115 Mich App 40, 50-52 (1982) and *In re Blankenship*, 165 Mich App 706, 713 (1988). See also *In re Koroly*, 145 Mich App 79, 88 (1985)(a putative father is not entitled to counsel where he voluntarily signs a disclaimer of paternity and a denial of interest in custody).

2. Guardian of Child or Parent

A guardian may release a child pursuant to MCL 710.28.

The term "guardian" refers to a full guardian, not a limited guardian. MCL 700.5206(4) prohibits a limited guardian from releasing a minor ward for adoption. However, included in the powers and duties of a full guardian is the ability to release a minor ward for adoption. MCL 700.5215(e).

MCL 710.28(1)(d)–(e) provide a release shall be executed:

> "(d) By the guardian of the child, subject to subsection (3), if a guardian has been appointed.
>
> "(e) By the guardian of a parent, subject to subsection (4), if a guardian has been appointed."

MCL 710.28(3)–(4) provide:

> "(3) The guardian of the child to be adopted may not execute a release of the child pursuant to subsection (1) unless the guardian has first obtained authority to execute the release from the court that appointed the guardian.
>
> "(4) The guardian of a parent may not execute a release of the parent's child pursuant to subsection (1) unless the guardian has first obtained authority to execute the release from the court that appointed the guardian. Such a release shall have the same effect as if the release were executed by the parent."

In order for a guardian to obtain the authority required to release a child for adoption, he or she must file a motion seeking authority in the court which appointed him or her as a guardian.

Note: The Adoption Code does not contain guidelines or procedures for conducting a hearing on a guardian's motion for authority to release a child for adoption. The Advisory Committee recommends that the court consider the purposes of the Adoption Code, see Section 1.4. See also, *In re Partello*, unpublished opinion per curiam of the Court of Appeals, decided September 15, 1998 (Docket No. 202757) (where the Court of Appeals upheld a lower court's order granting a guardian authority to consent to an adoption).

Attached in Appendix B is the SCAO form "Release of Child by Guardian."

MCL 710.24a(7) provides:

> "The court shall not appoint a guardian of the adoptee or of a parent solely for the purpose of defeating that parent's status as an interested party under this section."

The consent and release provisions of the Adoption Code are substantially similar, but consent is different than release. See MCL 700.28 and 700.43. MCL 710.22(k) defines consent as a document in which all parental rights over a specific child are voluntarily relinquished to the court for placement with a specific adoptive parent. A guardian may only execute a release to a child placing agency or the FIA. MCL 710.28(5). In *In re Spencer*, 338 Mich 50, 52 (1953), the Michigan Supreme Court held the authority of a guardian to consent to adoption implies the authority to release for adoption. As such the following cases may be interpreted to apply to both releases and consents.

In *In re Robins*, 153 Mich App 484, 487 (1986), the Michigan Court of Appeals held that a guardian may consent to an adoption as long as the guardian has first obtained consent from the court that authorized the guardianship. At the time *Robins* was decided, the Adoption Code permitted a parent to consent to an adoption only if the petitioner was related to the child within four degrees of consanguinity. The guardian's authority to consent was challenged on the grounds that the guardian was not related to the adoptee within the fourth degree of consanguinity. The court found that a guardian did not need to be related to the adoptee but must obtain authority to consent to an adoption from the court that authorized the guardianship. 153 Mich App at 487.

Note of Caution: It is generally accepted that a guardian has the authority to release a child for adoption as provided in MCL 710.28. However, there is a loop-hole in the Adoption Code. A guardian with authority from the court may release a child; however, no order terminating parental rights is ever entered for the biological parents. In practice the courts have determined that the order of adoption effectively terminates the parental rights of the biological parents.

The following Court of Appeals opinions are unpublished and therefore are *not* binding precedent. MCR 7.215(C). However, the following cases are persuasive. They are presented because the courts may face similar arguments to those contained in the following cases:

In *In re Partello*, unpublished opinion per curiam of the Court of Appeals, decided September 15, 1998 (Docket No. 202757), the

Court of Appeals held that a guardian may consent to a child's adoption as long as the guardian has obtained consent from the court that authorized the guardianship.

In *Partello*, the child's mother placed the child in a guardianship. Five years after placing the child with the guardian, the child's mother filed a motion to terminate the guardianship, and subsequently the guardian filed a petition for authorization to consent to the adoption of the child. After a hearing on the motion and petition, the court denied the motion to terminate the guardianship and granted the petition for authorization to consent to adoption. The court indicated that in granting the petition for authorization for adoption the court would be effectively terminating the parental rights of the mother. Because statutes and case law do not indicate what practice should be used in the decision to grant the petition for authorization, the court turned to the Juvenile Code to see if grounds for termination existed and, if so, what would be in the child's best interest based upon the factors found in the Adoption Code. After considering those factors, the court found "clear and convincing" evidence that it was in the child's best interests to authorize the guardian's petition to consent to the adoption and effectively terminate the mother's parental rights. The mother appealed the lower court's decision on the grounds that her parental rights had not been terminated and she did not consent to the adoption. The Court of Appeals upheld the lower court's authorization of the guardian to consent to the adoption, indicating that MCL 710.43(1) did not require the parent's consent when the child was placed in a guardianship.

In *In re Blaylock*, unpublished memorandum opinion of the Court of Appeals, decided December 28, 2001 (Docket No. 234755), the Court of Appeals held that a guardian may <u>not</u> consent to an adoption unless he or she first obtains either the consent of the parents or a termination of the parents' parental rights. In *Blaylock*, the petitioners were the guardians of a child they wanted to adopt. As guardians for the child, they filed a petition pursuant to MCL 710.43(1) seeking the authority from the court to consent to the child's adoption. The Court of Appeals found that MCL 710.43(1), which indicates a guardian can consent to adoption, conflicted with MCL 710.26(1)(a), MCL 710.41 and *In re Lang*, 236 Mich App 129, 133 (1999). MCL 710.26(1)(a) provides that unless a parent consents to adoption, a copy of the release or order terminating parental rights must be filed with an adoption petition. MCL 710.41 provides an order terminating parental rights must be entered prior to the court placing the child in a home for the purposes of adoption. In *In re Lang*, 236 Mich App 129, 133 (1999), the Michigan Court of Appeals held that if a child is born "out of wedlock" and the biological father does not voluntarily release his parental rights or consent to adoption, the child may not

be placed for adoption until the father's parental rights are terminated.

In *Blaylock,* the Court of Appeals held petitioners could not be granted authority to consent to adoption until they had obtained the consent of the parents or until the parents' parental rights had been terminated. The Court provided, "Allowing an adoption prior to the termination of parental rights would circumvent the procedural requirements included in the probate code and the adoption code intended to protect parents' fundamental rights. MCL 710.39; MCL 712A.19."

The court's interpretation in *Blaylock* negates the specific language of MCL 710.43, which provides that the guardian of a child may consent to adoption once the guardian has obtained authority from the court that authorized the guardianship. The court's interpretation also negates the specific language in MCL 700.5215(e), which provides that a full guardian's power includes the ability to release or consent to a minor ward's adoption. Statutes must be read as a whole so as to harmonize the meaning of their separate provisions and, if possible, avoid the construction of one provision in such a manner as to negate another. *People v Schneider*, 119 Mich App 480, 485-86 (1982). The interpretation provided by the court in *Blaylock,* negates the provisions in both MCL 710.43 and 700.5215(e), which provide that a guardian has the authority to consent to an adoption.

Prior to a guardian executing a release, FIA must indicate to the guardian what child placing agencies are located in the county. If the guardian requests another child placing agency in the county take the release, then the FIA must refer the guardian to that child placing agency. MCL 710.28(6).

3. Child Placing Agency

MCL 710.22(j) defines a child placing agency as "a private organization licensed under Act No. 116 of the Public Acts of 1973, being sections 722.111 to 722.128 of the Michigan Compiled Laws, to place children for adoption."

A child placing agency may release a child to the FIA for adoption purposes and the FIA must accept the release. MCL 710.28(1)(b) and MCL 710.28(7).

The child placing agency's authority to release a child for adoption is derived from either a court order committing the child to that agency or a release by the parents committing the child to that agency. MCL 710.28(1)(b)–(c) provide a release shall be executed:

> "(b) By the authorized representative of a child placing agency to whom the child has been committed by an order of the court.
>
> "(c) By the authorized representative of the child placing agency to whom the child has been released."

Attached in Appendix B is the SCAO form "Release of Child by Child Placing Agency."

B. Required Procedure for Release

In a release proceeding the interested parties as defined by MCL 710.24a(3) are the adoptee, if he or she is over the age of five, the FIA or child placing agency to which the adoptee is being released, and the person executing the release. In the interests of justice, the court may also deem others to be interested parties. MCL 710.24a(6). If a party to the release is incarcerated, see Section 2.16 for information regarding notice to an incarcerated party.

MCR 3.800 provides, "Except as modified by MCL 3.801–3.806, adoption proceedings are governed by the rules generally applicable to civil proceedings."

1. Who May Accept a Release

a) Judge or Referee

A parent's or guardian's release may be executed before either a judge of the Family Division of the Circuit Court or a referee of that court. MCL 710.29(1). A verbatim record of testimony related to the release must be made pursuant to MCL 710.29(1).

b) Individual Authorized by Law to Administer Oaths

A release may be executed and acknowledged before a person authorized by law to administer oaths for:

- a person in the armed services. MCL 710.29(2).
- a person in prison. MCL 710.29(2).
- a child placing agency that has jurisdiction of the child to be adopted. MCL 710.29(3).

Although a verbatim record must be made if the release is accepted by a judge or referee, MCL 710.29(2) does not contain the requirement for a verbatim record when the person accepting the release is a person authorized by law to administer oaths.

2. Petition and Supporting Documentation

A release by a parent or a guardian must be accompanied by the following documents:

1) MCL 710.29(5) requires a **verified statement to accompany release** to contain all of the following:

> "(a) That the parent or guardian has received a list of support groups and if the release is to a child placing agency, a copy of the written document described in section 6(1)(c) of the foster care and adoption services act, Act No. 203 of the Public Acts of 1994, being section 722.956 of the Michigan Complied Laws.*
>
> "(b) That the parent or guardian has received counseling related to the adoption of his or her child or waives the counseling with the signing of the verified statement.
>
> "(c) That the parent or guardian has not received or been promised any money or anything of value for the release of the child, except for lawful payments that are itemized on a schedule filed with the release.*
>
> "(d) That the validity and finality of the release is not affected by any collateral or separate agreement between the parent or guardian and the agency, or the parent or guardian and the prospective adoptive parent.
>
> "(e) That the parent or guardian understands that it serves the welfare of the child for the parent to keep the child placing agency or [FIA] informed of any health problems that the parent develops that could affect the child.
>
> "(f) That the parent or guardian understands that it serves the welfare of the child for the parent or guardian to keep his or her address current with the child placing agency or [FIA] in order to permit a response to any inquiry concerning medical or social history from an adoptive parent of a minor adoptee or from an adoptee who is 18 years of age or older."

*See Section 2.5 for information regarding the requirements contained in MCL 722.956(1)(c). See Appendix F for a list of adoption support groups.

*See Section 10.2 for information regarding consideration for adoption services.

Attached in Appendix B is the SCAO form "Statement to Accompany Release."

2) A **statement of money or valuables received or promised**.* MCL 710.54 provides:

> "(1) Except for charges and fees approved by the court, a person shall not pay or give, offer to pay or give, or

*See Section 10.2 for more information on compensation for adoption.

> request, receive, or accept any money or other consideration or thing of value, directly or indirectly, in connection with . . .
>
> (c) A release."

*See Section 10.3 for a detailed discussion of a verified accounting statement.

In order for the court to ensure that no money or valuables were exchanged or promised in exchange for the release, a verified accounting statement* signed by the petitioner should be filed with the court.

Attached in Appendix B is the SCAO form "Parent's or Guardian's Verified Accounting for Adoption Release or Direct Placement Adoption."

3) Documentation regarding the party's **authority to release** the child for adoption. MCL 710.28(9) provides a release shall be accompanied, where applicable, by proof of termination of parental rights, release of parental rights, appointment, or commitment. Therefore, a guardian must also file proof of the authority to execute a release granted to them by the court that put the guardianship in place.

   A child placing agency must file proof of either termination of the parents' rights, or release of the parents' rights.

   As a practical matter, courts often request additional information at the time of a release. A release is usually a precursor to adoption; therefore, requiring additional paperwork to be filed at the same time as the release allows for a smooth transition to adoption proceedings. See Appendix A for an example of a checklist that includes additional paperwork necessary for the execution of a release in Kalamazoo County. Also contained in Appendix A is a list from Oakland County containing its paperwork requirements for a release hearing.

C. Release Hearing

MCL 710.29(6) provides:

> "A release by a parent or a guardian of the child shall not be executed until after the investigation the court considers proper. . . ."

The investigation is left to the sound discretion of the court. In *Gonzales v Toma*, 330 Mich 35, 38 (1951), the Michigan Supreme Court stated:

> "The statute leaves to the discretion of that court what investigation shall be made; and failure of the record to

> disclose its nature and extent, if any, cannot, therefore, be said to be fatal to the proceedings."

See also *In re Blankenship*, 165 Mich App 706, 714 (1988), where the Court of Appeals found the court's questioning of the parties during the release procedure was sufficient to satisfy the investigation requirement of MCL 710.29(6).

The court* must also explain to the parent or guardian his or her legal rights and by virtue of the release he or she is voluntarily and permanently relinquishing rights to the child. MCL 710.29(6) provides a release shall not be executed:

> ". . . until after the judge, referee, or other individual authorized in subsection (2) has fully explained to the parent or guardian the legal rights of the parent or guardian and the fact that the parent or guardian by virtue of the release voluntarily relinquishes permanently his or her rights to the child. . . ."

*The "court" providing the explanation to the parent may be a judge, referee or a person authorized by law to administer oaths. See MCL 710.29(2) and (6).

Parental rights to a child include the rights to custody, control, services, earnings and the right to inherit from the minor. MCL 722.2 (Status of Minors and Child Support Act) and 700.2103(b) (Estates and Protected Individuals Code).

If the child is over 5 years of age, then the court must also consider whether the child is "best served by the release." MCL 710.29(6) and *In re Buckingham*, 141 Mich App 828, 836-37 (1985).

If the court finds the release to be in the best interests of the child, the court may accept the release. If the court does not find that the best interests of the child are served by the release, then the court may *not* accept the release. MCL 710.29(6) and *In re Buckingham,* 141 Mich App 828, 837 (1985).

MCL 710.22(f) provides:

> "'Best interests of the adoptee' or 'best interests of the child' means the sum total of the following factors to be considered, evaluated, and determined by the court to be applied to give the adoptee permanence at the earliest possible date:
>
> > "(i) The love, affection, and other emotional ties existing between the adopting individual or individuals and the adoptee or, in the case of a hearing under [MCL 710.39],* the putative father and the adoptee.
> >
> > "(ii) The capacity and disposition of the adopting individual or individuals or, in the case of a hearing under [MCL 710.39], the putative father to give the adoptee love, affection, and guidance, and to educate and create a milieu

*See Section 2.12(C)–(F) for more information on MCL 710.39.

*See Section 6.2(B) for a discussion of considerations of religion and race.

that fosters the religion, racial identity, and culture of the adoptee.*

"(iii) The capacity and disposition of the adopting individual or individuals or, in the case of a hearing under [MCL 710.39], the putative father, to provide the adoptee with food, clothing, education, permanence, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

"(iv) The length of time the adoptee has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

"(v) The permanence as a family unit of the proposed adoptive home, or, in the case of a hearing under [MCL 710.39], the home of the putative father.

"(vi) The moral fitness of the adopting individual or individuals or, in the case of a hearing under [MCL 710.39], of the putative father.

"(vii) The mental and physical health of the adopting individual or individuals or, in the case of a hearing under [MCL 710.39], of the putative father, and of the adoptee.

"(viii) The home, school, and community record of the adoptee.

"(ix) The reasonable preference of the adoptee, if the adoptee is 14 years of age or less and if the court considers the adoptee to be of sufficient age to express a preference.

"(x) The ability and willingness of the adopting individual or individuals to adopt the adoptee's siblings.

"(xi) Any other factor considered by the court to be relevant to a particular adoption proceeding, or to a putative father's request for child custody."

If the court denies the petition for release, the court must state the reasons for the denial on the record or in writing. MCL 710.63.

The release must be valid, or the court must not order the voluntary termination of parental rights. *In re Buckingham*, 141 Mich App 828, 834 (1985). In *Buckingham*, proceedings were initiated under the Juvenile Code alleging the child came within the jurisdiction of the court because the parents abused and neglected the child. The mother orally consented to release her

parental rights. The probate court then entered an order on a Juvenile Code form, indicating that the mother had consented to the child becoming a permanent ward of the court. 141 Mich App at 836. The Court of Appeals reversed the order terminating the mother's parental rights pursuant to an invalid release. The Court held, "the failure of the [court] to find that the release would be in the best interests of the children, and the [court's] failure to distinguish the adoption code from the juvenile code mandates a finding that the release of respondent mother was legally inadequate and therefore void." 141 Mich App at 837.

D. Effect of Release

Termination of Parental Rights. MCL 710.29(7) provides:

> "Upon the release of a child by a parent or guardian, the court immediately shall issue an order terminating the rights of that parent or guardian to that child. If the rights of both parents, the surviving parent, or the guardian have been terminated, the court shall issue an order committing the child to the child placing agency or [FIA] to which the release was given."
>
> Attached in Appendix B is the SCAO form "Order Terminating Parental Rights After Release or Consent."

Note: Upon the release of a child, MCL 710.29(7) requires the court to *immediately* enter the order terminating parental rights. The court may *not* hold the release and enter the order terminating parental rights at a later date. However, MCL 710.31(3) provides that the mother, at the time of her release, may request the court delay the formal execution of her release, until after the court determines the status of a putative father's request for custody of the child.

Child Becomes a State Ward. The child becomes a state ward once the child is released to the FIA. MCL 710.28(8).

Documentation to Parent or Guardian. A parent or guardian who releases his or her parental rights should be served with a copy of the order terminating parental rights, an advice of rights, a pamphlet on release of adoption information, and a parent's consent/denial to release identifying information form.* MCL 710.27a(4).

*See Sections 9.3–9.6 for information on the release of identifying information.

Termination of Jurisdiction. Entry of an order terminating the rights of both parents under the release provisions of the Adoption Code terminates the jurisdiction of the circuit court over the child in any divorce or separate maintenance action. MCL 710.29(9).

2.2 Revocation of Release*

*See Section 2.2(F), below, regarding distinguishing a revocation of release from a rehearing.

A parent or guardian who executes a release may ask the court to revoke the release. MCL 710.29(10) provides:

> "Upon petition of the same person or persons who executed the release and of the [FIA] or child placing agency to which the child was released, the court with which the release was filed may grant a hearing to consider whether the release should be revoked. A release may not be revoked if the child has been placed for adoption unless the child is placed as provided in [MCL 710.41(2)]* and a petition for rehearing or claim of appeal is filed within the time required. A verbatim record of testimony related to a petition to revoke a release shall be made."

*MCL 710.41(2) refers to "legal risk" placements. See Section 8.5 for more information on "legal risk" placements.

A. Time for Filing a Petition for Revocation of Release

MCL 710.64(1) provides:

> "Upon the filing of a petition in court within 21 days after entry of any order under this chapter, and after due notice to all interested parties, the judge may grant a rehearing and may modify or set aside the order."

In *In re Buckingham*, 141 Mich App 828, 835 (1985), the court held that a parent whose rights were terminated following a release has 20* days to seek a rehearing and the court has the discretion to grant or deny the rehearing and the petition.

*MCL 710.64 previously provided 20 days, but was amended in 1994 to provide 21 days.

In *In re Meyers,* 131 Mich App 160, 163–64 (1983), the Michigan Court of Appeals stated:

> "Under §64(1), a petitioner has 20 days after voluntarily executing a release to petition the court for a hearing to revoke that release. *In the Matter of Michael Brent Hole*, 102 Mich App 286, 291; 301 NW2d 507 (1980); *In the Matter of Baby Girl Fletcher*, 76 Mich App 219, 229-221, 223; 256 NW2d 444 (1977). Whether to grant the petitioner's request for a hearing and whether to grant the relief sought are matters left to the sound discretion of the probate court. *In the Matter of Michael Brent Hole*, 102 Mich App 290, fn 1. Where the petitioner waits more than 20 days after the execution of a release, the probate court is without jurisdiction to consider a request for a hearing to revoke unless the child placing agency joins or acquiesces in the petition. *In the Matter of Michael Brent Hole,* 102 Mich App 291–292; *In the Matter of Baby Girl Fletcher,* 76 Mich App 220-222. Where this condition is met, the decision to grant a hearing and the decision to grant revocation are resurrected for the exercise of discretion of the probate court,

> though once the child has been placed for adoption the petition may not be entertained. *In the Matter of Michael Brent Hole*, 102 Mich App 290, fn. 1."

B. Jurisdiction of the Court in Petition for Revocation of Release

If 21 days have elapsed since the execution of a release and the child has been placed for adoption, the court does not have jurisdiction over the petition for revocation of release of parental rights even if the FIA or the child placing agency joins in the petition. See *In re Meyers,* 131 Mich App 160, 163-64 (1983), quoted above.

If a parent files a petition for revocation of release within 20* days of the release and the FIA or the child placing agency refuses to join in the petition, the probate court does *not* have jurisdiction to hear the petition for revocation of release. *In re Baby Girl Fletcher*, 76 Mich App 219, 220-22 (1977).

*MCL 710.64 previously provided 20 days, but was amended in 1994 to provide 21 days.

C. Court's Discretion to Grant or Deny the Petition for Revocation of Release

Where a parent knowingly and voluntarily releases his or her parental rights, it is not an abuse of discretion for the court to deny a revocation based solely on a "change of heart." See *In re Curran,* 196 Mich App 380, 385 (1992), and *DeBoer v Child and Family Services of Michigan, Inc,* 76 Mich App 641, 645-46 (1977).

When the court believes that the statutory provisions of the Adoption Code have been complied with for a release, it is not an abuse of discretion for the court to look to the best interests* of the child when determining whether or not to revoke that release. *Puryear v Catholic Human Services*, 236 Mich App 291, 292-93 (1999). See also *In re Blankenship*, 165 Mich App 706, 713-14 (1988) (it was not an abuse of discretion to deny revocation in light of the instability of the parents' relationship and best interests of the child).

*See Section 1.4 for the "best interest" factors provided in the Adoption Code.

D. Appeals from a Denial of Revocation by the Court

An appeal from an order denying revocation may be filed with the Court of Appeals pursuant to MCL 710.65(1), which provides:

> "(1) A party aggrieved by an order that is entered by the court under this chapter, including an order entered after a rehearing, may appeal the order to the court of appeals as of right not later than 21 days after the order is entered by the court or not later than 21 days after a petition for rehearing is denied.
>
> "(2) An order of the court entered under this chapter shall not be stayed pending appeal unless ordered by the court of appeals upon

> motion for good cause shown and on such terms as are deemed just.
>
> "(3) An appeal from an order entered under this chapter shall be given priority in the court of appeals and shall take precedence over all other matters, except for other matters that are given priority by specific statutory provision or rule of the supreme court."

The standard of review for a denial of a revocation of release is abuse of discretion. *In re Curran*, 196 Mich App 380, 381 (1992) and *In re Burns*, 236 Mich App 291, 292 (1999).

E. Rehearing on a Release

MCL 710.64 provides:

> "(1) Upon the filing of a petition in court within 21 days after entry of any order under this chapter, and after due notice to all interested parties, the judge may grant a rehearing and may modify or set aside the order.
>
> "(2) The court shall enter an order with respect to the original hearing or rehearing of contested matters within 21 days after the termination of the hearing or rehearing."

A parent who has released parental rights may file, within 21 days of the order, a motion to set aside the order terminating parental rights. The court's findings on a rehearing may be appealed to the Court of Appeals pursuant to MCL 710.65, quoted in Section 2.2(D), above.

Filing, Notice, and Response. MCR 3.806(A) provides:

> "A party may seek rehearing under MCL 710.64(1) by timely filing a petition stating the basis for rehearing. Immediately upon filing the petition, the petitioner must give all interested parties notice of its filing in accordance with MCR 5.105. Any interested party may file a response within 7 days of the date of service of notice on the interested party."

Interested parties in a hearing relating to the execution of a release are defined by MCL 710.24a(3). They include the adoptee, if over the age of five, the FIA or the child placing agency to whom the child is being released, and the person executing the release.*

*If any party to the release is an incarcerated party, see Section 2.16.

MCR 3.802(A) provides that service on an interested person may be made by mail pursuant to MCR 2.107(C)(3). MCR 2.107(C)(3) provides:

> "Mailing a copy under this rule means enclosing it in a sealed envelope with first class postage fully prepaid, addressed to the person to be served, and depositing the envelope and its contents in the United States mail. Service by mail is complete at the time of mailing."

Procedure for Determining Whether to Grant a Rehearing. MCR 3.806(B) provides: "The court must base a decision on whether to grant a rehearing on the record, the pleading filed, or a hearing on the petition. The court may grant a rehearing only for good cause. The reasons for its decision must be in writing or stated on the record."

Procedure if Rehearing Is Granted. MCR 3.806(C) provides: "If the court grants the rehearing, the court may, after notice, take new evidence on the record. It may affirm, modify, or vacate its prior decision in whole or in part. The court must state the reasons for its action in writing or on the record."

Stay of Proceedings. MCR 3.806(D) provides: "Pending a ruling on the petition for rehearing, the court may stay any order, or enter another order in the best interest of the minor.*"

*See Section 1.4 for the factors to be considered in determining the "best interests" of the minor.

F. Distinguishing a Revocation of Release and a Rehearing

Petition Joined by the FIA or Child Placing Agency. A petition for revocation of a release of parental rights must be joined by the FIA or the child placing agency. MCL 710.29(10). Without the FIA or child placing agency joining in the petition for revocation of release of parental rights, the court is without jurisdiction to hear the petition. *In re Baby Girl Fletcher*, 76 Mich App 219, 220-22 (1977).

In contrast, the FIA or child placing agency is not required to join a motion pursuant to MCL 710.64(1) requesting rehearing on an order issued by the court pursuant to the Adoption Code.

Time Requirements. MCL 710.64(1) establishes that a petition filed with the court asking the court to grant a rehearing must be filed within 21 days of the entry of the order. On the other hand, MCL 710.29(10) provides a parent may file a petition to revoke a release of parental rights if he or she is joined in the petition by the FIA or the child placing agency, but that statutory provision does not contain a time requirement.

The relationship between MCL 710.29 and MCL 710.64 was explored in *DeBoer v Child and Family Services of Michigan, Inc,* 76 Mich App 641, 645 (1977). In that case, the court found that the statutes should be read together to require a petition for revocation of release to be filed within the 21 days required by MCL 710.64(1). However, in *In re Baby Girl Fletcher*, 76 Mich App 219, 222-23 (1977), the court held that both statutes operated independently and therefore the time requirement in MCL 710.64(1) did not apply to a petition for revocation of release.

The Michigan Court of Appeals resolved this conflict in *In re Hole*, 102 Mich App 286, 291-92 (1980). The *Hole* Court held:

> "[I]f a petition to revoke a release is brought within 20 days of entry of the court's order, the [court] has discretion to set aside the release. The [court] also has discretion under [MCL 710.29(9)*] to set aside a release at any time prior to placement for adoption when a petition requesting such relief has been filed by the parent or parents executing the release and the petition has been acquiesced in by the agency to which the child was released."

*MCL 710.29(9), as referred to by the Court of Appeals in *Hole*, was renumbered by amendment in 1994 to MCL 710.29(10).

Therefore, a rehearing must be filed within 21 days, while the time requirement for a petition for revocation is left to the discretion of the court, as long as the child has not been placed for adoption.*

*Placing the child in a "legal risk" placement does not deprive the court of jurisdiction. See Section 8.5 for more on "legal risk" placements.

2.3 Special Considerations for Fathers in Release Proceedings

Legal, biological, and/or putative fathers may be involved in adoption proceedings. Chapter 3 covers the topic of identifying a father and the procedures associated with that process. However, there are specific provisions regarding fathers which apply when a mother is going to release her parental rights.

Notice of Intent to Release. Prior to the birth of a child "out of wedlock," a mother may file an ex parte petition seeking a notice of intent to release the expected child for adoption. MCL 710.34(1). The purpose of the notice of intent to release is to provide a putative father with the earliest possible notice and to facilitate the early placement of the child for adoption. MCL 710.34(1).

Under MCL 710.34(1), the ex parte petition must be verified and contain the following information:

- The approximate date and location of conception of the child and the expected date of the mother's confinement.
- The alleged putative father or fathers.
- A request for the court to inform the putative father of his right to file a notice of intent to claim paternity before the birth of the child and inform the putative father of the rights to which his filing of a notice of intent to claim paternity will entitle him under MCL 710.33.*

*See Section 3.5 for information regarding the rights of a putative father pursuant to MCL 710.33.

Attached in Appendix B is the SCAO form "Petition to Issue Notice of Intent to Release or Consent."

Under MCL 710.34(2), upon the filing of the petition, the court shall issue a notice of intent to release, which contains the following information:

- The approximate date and location of the conception of the child and the expected date of confinement of the mother.
- The putative father's right to file a notice of intent to claim paternity before the birth of the child.
- The putative father's rights to which his filing of a notice of intent to claim paternity will entitle him under MCL 710.33(3).
- Notice to the putative father that failing to file a notice of intent to claim paternity before the expected date of confinement or before the birth of the child, whichever is later, has the following consequences:

  1) it waives his right to receive the notice to which he would otherwise be entitled, and

  2) it constitutes a denial of his interest in custody of the child, which will result in the termination of his parental rights to the child.

The form and notice of the intent to release must be approved by the State Court Administrator pursuant to MCL 710.36. The approved form is attached in Appendix B.

The notice of intent to release shall be served upon the putative father by any officer or person authorized to serve process by the court, and a proof of service shall be filed with the court. MCL 710.34(1) and MCR 3.802(A)(1).

If the father is served with a notice and does not respond, it is the only notice of the proceedings that he is entitled to receive. MCL 710.34(2)(d).

A putative father who has not taken the necessary steps to establish a relationship with the child is entitled to less due process, including notice. *Lehr v Robertson*, 463 US 248, 267-68 (1983).*

*See Section 3.2 for a detailed discussion of the due process and equal protection rights of fathers.

2.4 Voluntary Termination of Parental Rights in a Child Protective Proceeding

When the court has taken jurisdiction over a child in a child protective proceeding under MCL 712A.2(b), the court has the authority to conduct a hearing to determine if parental rights should be terminated. MCL 712A.19b. A parent may agree to voluntarily terminate his or her parental rights. The parent must either enter an admission to a ground for termination, or voluntarily release his or her parental rights pursuant to the release provisions in the Adoption Code. *In re Toler*, 193 Mich App 474, 477 (1992).

See Miller, *Child Protective Proceedings Benchbook, Abuse and Neglect Cases,* (MJI 1999), for more information on termination of parental rights pursuant to the Juvenile Code.

> **Note:** A parent's parental rights to a subsequent child may be terminated if that parent has voluntarily released his or her rights to a previous child after initiation of proceedings under the Juvenile Code. See MCL 712A.19b(3)(m).

2.5 Information to Accompany Release

*See Section 2.1(B)(2) for more information on a verified statement to accompany a release.

When a parent or guardian is releasing a child to a child placing agency, MCL 710.29(5) requires a verified statement to accompany the release* of parental rights. The verified statement must contain an acknowledgment by the parent or guardian that he or she has received a copy of information provided pursuant to MCL 722.956(1)(c).

*See Section 8.2(B) for information on adoption facilitators.

MCL 722.956(1)(c) provides that an adoption facilitator* must:

> "Prepare and provide to each individual who inquires about services a written document that includes all of the following information:
>
> "(i) Types of adoptions the adoption facilitator handles.
>
> "(ii) A description of the services that the adoption facilitator provides.
>
> "(iii) A description of services that are available by referral.
>
> "(iv) Eligibility requirements the adoption facilitator has for adoptive families, if any.
>
> "(v) If the adoption facilitator is a child placing agency, the procedure used, or range of options the agency offers, for selecting a prospective adoptive parent for a child, including the role of the child's parent or guardian in the selection process.
>
> "(vi) The extent to which the adoption facilitator permits or encourages the exchange of identifying information* or contact between biological and adoptive parents.

*See Sections 9.9–9.6 for information on the release of identifying information.

"(vii) A description of postfinalization services that the adoption facilitator provides, if any.

"(viii) A schedule of all fees that the adoption facilitator charges for adoption services.

"(ix) A statement that each party to an adoption has a right to independent representation by an attorney and that 1 attorney may not represent both the biological parents or guardian and the prospective adoptive parents."

2.6 Consent to Adoption

The Adoption Code defines "consent" as a document in which all parental rights over a specific child are voluntarily relinquished to the court for placement with a specific adoptive parent. MCL 710.22(k).

Note: Voluntary consent to adoption applies only to child adoptions. Consent of an adoptee's parents is not a necessary component of adult adoptions. MCL 710.43(3). A parent does *not* need to consent to the adoption of an adult adoptee where the termination of the mother's parental rights is not sought. See *In re Munson*, 210 Mich App 500, 534 (1995).

A. Persons Authorized to Execute a Consent

1) Parent

Pursuant to MCL 710.43(1)(a)(i)–(iv), a parent may consent to his or her child's adoption except under any of the following circumstances:

- the parent's parental rights have been terminated by a court of competent jurisdiction,
- the child has been released for the purpose of adoption to a child placing agency or the FIA,
- a guardian has been appointed for the child,
- a guardian has been appointed for the parent, or
- a parent having legal custody of the child is married to the petitioner.*

*See Section 8.3 regarding step-parent adoption.

MCL 710.55a(2) provides:

> "In a direct placement* or agency placement adoption, if the minor parent of a child who is a potential adoptee is not represented by an attorney, the adoption attorney or child placing agency that is providing adoption services involving that minor parent shall provide the minor parent with an opportunity to discuss with an attorney who is not associated with the adoption attorney or child placing agency the legal ramifications of a consent or release, or of the termination of parental rights, before the execution of a consent or release or the termination of parental rights."

*For information on direct placement adoptions, see Section 8.1.

Attached in Appendix B is the SCAO form "Consent to Adoption by Parent."

2) Guardian of a Child or Parent

A child's guardian may consent to the child's adoption if the guardian first obtains authority to consent from the court that appointed the guardian. MCL 710.43(1)(e). The term "guardian" refers to a full guardian, not a limited guardian. MCL 700.5206(4) prohibits a limited guardian from consenting to a minor ward's adoption. However, included in the powers and duties of a full guardian is the ability to consent to the adoption of a minor ward. MCL 700.5215(e).

MCL 710.43(1)(e)–(f) provides:

> "(1) Subject to this section and [MCL 710.44] and [MCL 710.51], consent to adoption of a child shall be executed:
>
> . . . .
>
> "(e) By the guardian of the child, subject to subsection (5), if a guardian has been appointed.
>
> "(f) By the guardian of a parent, subject to subsection (6), if a guardian has been appointed."

MCL 710.43(5)–(6) provide:

> "(5) The guardian of the child to be adopted shall not execute a consent to that child's adoption pursuant to subsection (1) unless the guardian has first obtained authority to execute the consent from the court that appointed the guardian.
>
> "(6) The guardian of a parent shall not execute a consent to the adoption of the parent's child pursuant to subsection (1) unless the guardian has first obtained authority to execute the consent from the court that appointed the guardian. The consent shall have the same effect as if the consent were executed by the parent."

Attached in Appendix B is the SCAO form "Consent to Adoption by Guardian."

In *In re Robins*, 153 Mich App 484, 487 (1986), the Michigan Court of Appeals held that a guardian may consent to an adoption as long as the guardian first obtains consent from the court that authorized the guardianship. At the time *Robins* was decided, the Adoption Code permitted a parent to consent to an adoption only if the petitioner was related to the child within four degrees of consanguinity. The guardian's authority to consent was challenged on the grounds that the guardian was not related to the adoptee within the fourth degree of consanguinity. The Court found that a guardian did not need to be related to the adoptee, but a guardian must first obtain authority to consent from the court that authorized the guardianship. 153 Mich App at 487.

Note of Caution: It is generally accepted that a guardian has the authority to consent to an adoption as provided in MCL 710.28. However, there is a loop-hole in the Adoption Code. A guardian with authority from the court may release a child; however, no order terminating parental rights is ever entered for the biological parents. In practice the courts have determined that the order of adoption effectively terminates the parental rights of the biological parents.

The following Court of Appeals opinions are *unpublished* and therefore are *not* binding precedent. MCR 7.215(C). However, the following cases are persuasive. They are presented because courts may face similar arguments to those contained in the following cases:

In *In re Partello*, unpublished opinion per curiam of the Court of Appeals, decided September 15, 1998 (Docket No. 202757), the Court of Appeals held that a guardian may consent to a child's adoption as long as the guardian has obtained consent from the court that authorized the guardianship.

In *Partello*, the child's mother placed the child in a guardianship. Five years after placing the child with the guardian, the child's mother filed a motion to terminate the guardianship, and subsequently the guardian filed a petition for authorization to consent to the adoption of the child. After a hearing on the motion and petition, the court denied the motion to terminate the guardianship and granted the petition for authorization to consent to adoption. The court indicated that in granting the petition for authorization for adoption the court would be effectively terminating the parental rights of the mother. Because statutes and case law do not indicate what practice should be used in the decision to grant the petition for authorization, the court turned to the Juvenile Code to see if grounds for termination existed and, if so, what would be in the child's best interest based upon the factors found in the Adoption Code. After considering those factors, the court found "clear and convincing" evidence that it was in the child's best interests to authorize the guardian's petition to

consent to the adoption and effectively terminate the mother's parental rights. The mother appealed the court's decision on the grounds that her parental rights had not been terminated and she did not consent to the adoption. The Court of Appeals upheld the lower court's authorization of the guardian to consent to the adoption, indicating that MCL 710.43(1) did not require the parent's consent when the child was placed in a guardianship.

In *In re Blaylock*, unpublished memorandum opinion of the Court of Appeals, decided December 28, 2001 (Docket No. 234755), the Court of Appeals held that a guardian may *not* consent to an adoption unless he or she first obtains either the consent of the parents or a termination of the parents' parental rights. In *Blaylock*, the petitioners were the guardians of a child they wanted to adopt. As guardians for the child, they filed a petition pursuant to MCL 710.43(1) seeking the authority from the court to consent to the child's adoption. The Court of Appeals found that MCL 710.43(1), which indicates a guardian can consent to adoption, conflicted with MCL 710.26(1)(a), MCL 710.41 and *In re Lang*, 236 Mich App 129, 133 (1999). MCL 710.26(1)(a) provides that unless a parent consents to adoption, a copy of the release or order terminating parental rights must be filed with an adoption petition. MCL 710.41 provides an order terminating parental rights must be entered prior to the court placing the child in a home for the purposes of adoption. In *In re Lang*, 236 Mich App 129, 133 (1999), the Michigan Court of Appeals held if a child is born "out of wedlock" and the biological father does not voluntarily release his parental rights or consent to adoption, the child may not be placed for adoption until the father's parental rights are terminated.

In *Blaylock,* the Court of Appeals held petitioners could not be granted authority to consent to adoption until they had obtained the consent of the parents or until the parents' parental rights had been terminated. The Court provided, "Allowing an adoption prior to the termination of parental rights would circumvent the procedural requirements included in the probate code and the adoption code intended to protect parents' fundamental rights. MCL 710.39; MCL 712A.19."

The court's interpretation in *Blaylock* negates the specific language of MCL 710.43, which provides that the guardian of a child may consent to an adoption once the guardian has obtained authority from the court. The court's interpretation also negates the specific language in MCL 700.5215(e), which provides that a full guardian's power includes the ability to consent to the adoption of a minor ward. Statutes must be read as a whole so as to harmonize the meaning of their separate provisions and, if possible, avoid the construction of one provision in such a manner as to negate another. *People v Schneider*, 119 Mich App 480, 485-86 (1982). The interpretation provided by the court in *Blaylock,* negates the provisions in both MCL 710.43 and 700.5215(e), which provide that a guardian has the authority to consent to an adoption.

3) Child Over 14 Years Old

"If the child to be adopted is over 14 years of age, that child's consent is necessary before the court may enter an order of adoption." MCL 710.43(2).

Attached in Appendix B is the SCAO form "Consent to Adoption by Adoptee."

4) Adult Adoptee

MCL 710.43(3) provides:

> "If the individual to be adopted is an adult, the individual's consent is necessary before the court may enter an order of adoption, but consent by any other individual is not required."

Attached in Appendix B is the SCAO form "Consent to Adoption by Adoptee."

5) Court Consent to Adoption of Permanent Court Ward

MCL 710.43(1)(c) provides:

> "(1) Subject to this section and [MCL 710.44] and [MCL 710.51], consent to adoption of a child shall be executed:
>
> . . . .
>
> "(c) By the court or by a tribal court having permanent custody of a child."

Attached in Appendix B is the SCAO form "Consent to Adoption by Agency/ Court."

6) The FIA or a Child Placing Agency

MCL 710.43(1)(d) provides:

> "(1) Subject to this section and [MCL 710.44] and [MCL 710.51], consent to adoption of a child shall be executed:
>
> . . . .
>
> "(d) By the authorized representative of the [FIA] or of a child placing agency to whom the child has been released."

The superintendent of the Michigan Children's Institute (MCI) is authorized to consent to the adoption of any child who has been committed to MCI. MCL 400.209.

See Appendix B for the SCAO form "Consent to Adoption by Agency/Court."

7) Child Placing Agency or Court in Another State or Country

MCL 710.43(1)(g) provides:

> "(1) Subject to this section and [MCL 710.44] and [MCL 710.51], consent to adoption of a child shall be executed:
>
> . . . .
>
> > "(g) By the authorized representative of a court or child placing agency of another state or country that has authority to consent to adoption."

However, the court having jurisdiction over the adoption in this state must determine if the consent was properly executed in the other state or country. MCL 710.44(4) provides:

> "If the consent is executed in another state or country, the court having jurisdiction over the adoption proceeding in this state shall determine whether the consent was executed in accordance with the laws of that state or country or the laws of this state and shall not proceed unless it finds that the consent was so executed."

8) Unemancipated Minor Parent

If the adoptee's parent is an unemancipated minor, then the parent, guardian, or guardian ad litem of the parent must also consent to an adoption. MCL 710.43(4) provides:

> "If the parent of the child to be adopted is an unemancipated minor, that parent's consent is not valid unless a parent, guardian, or guardian ad litem of that minor parent has also executed the consent."

9) Step-Parent Adoption*

*See Section 8.3 for information on step-parent adoptions.

Pursuant to MCL 710.43(7), a step-parent may petition for adoption of a step-child when:

- the petitioner for adoption is married to the parent having legal custody of the child, *and*
- the parent to whom the petitioner is married has joined in the petition for adoption, *and*

- the parent who does not have legal custody of the child either has his or her parental rights terminated* or consents to the adoption.

*See Sections 2.11–2.14, for information regarding termination of parental rights.

B. Required Procedure for Consent

1) Who May Accept a Consent

a) Judge or Referee

A consent may be executed before a judge of the Family Division of the Circuit Court or a referee of that court. MCL 710.44(1).

b) Individual Authorized by Law to Administer Oaths

A consent may be executed and acknowledged before any individual authorized by law to administer oaths for:

- an individual in the armed services. MCL 710.44(2).
- an individual in prison. MCL 710.44(2).
- a child placing agency. MCL 710.44(3).

2) Contents of the Consent for Direct Placement

A direct placement adoption* allows a parent or guardian to select an adoptive parent for a child and transfer physical custody of the child to the prospective adoptive parent. The prospective parent *cannot* include a step-parent or an individual related to the child within the fifth degree by marriage, blood, or adoption. MCL 710.22(n) and MCL 710.23a.

*See Section 8.1 for information on direct placement adoptions.

Pursuant to MCL 710.44(5)(a)–(f), a consent by a parent or guardian for direct placement must be accompanied by a **verified statement** signed by the parent or guardian that includes all of the following:

> "(a) That the parent or guardian has received a list of support groups and a copy of the written document described in section 6(1)(c) of the foster care and adoption services act, Act No. 203 of the Public Acts of 1994, being section 722.956 of the Michigan Complied Laws.*

*See Section 2.5 for a detailed discussion of MCL 722.956.

> "(b) That the parent or guardian has received counseling related to the adoption of his or her child or waives the counseling with the signing of the verified statement.

> "(c) That the parent or guardian has not received or been promised any money or anything of value for the consent to adoption of the child, except for lawful payments that are itemized on a schedule filed with the consent.*

*See Section 10.2 for information on compensation for consent to adoption.

> "(d) That the validity and finality of the consent is not affected by any collateral or separate agreement between the parent or guardian and the adoptive parent.
>
> "(e) That the parent or guardian understands that it serves the welfare of the child for the parent to keep the child placing agency, court or [FIA] informed of any health problems that the parent develops which could affect the child.
>
> "(f) That the parent or guardian understands that it serves the welfare of the child for the parent or guardian to keep his or her address current with the child placing agency, court, or [FIA] in order to permit a response to any inquiry concerning medical or social history* from an adoptive parent of a minor adoptee or from an adoptee who is 18 years or older."

*See Chapter 9 regarding the release of information.

Attached in Appendix B is the SCAO form "Statement to Accompany Consent in Direct Placement."

C. Consent Hearing

Time Requirements. The consent hearing must be held within seven days after it is requested. MCL 710.44(1).

MCR 3.804 provides:

> "The consent hearing required by MCL 710.44(1) must be promptly scheduled by the court after the court examines and approves the report of the investigation or foster family study filed pursuant to MCL 710.46.* If an interested party has requested a consent hearing, the hearing shall be held within 7 days of the filing of the report or foster family study."

*See Section 5.5 for more information on investigation reports.

MCR 3.800 provides, "Except as modified by MCR 3.801–3.806, adoption proceedings are governed by the rules generally applicable to civil proceedings."

See Appendix A for the checklist used by Oakland County for Consent Hearing Requirements.

Verbatim Record. A verbatim record must be made of consent hearings that are conducted by a judge or referee. MCL 710.44(1). However, MCL 710.44(2) and (3) do not indicate that a verbatim record must be made of a consent hearing conducted by an individual authorized by law to administer oaths.

Explanation of Rights. Prior to authorizing a consent, the judge, referee or person authorized to administer oaths must fully explain to a parent or guardian his or her legal rights in relation to the child and that the consent voluntarily relinquishes those rights permanently.MCL 710.44(6).

Parental rights to a child include the rights to custody, control, services, earnings and the right to inherit from the minor. MCL 722.2 (Status of Minors and Child Support Act) and MCL 700.2103(b)(Estates and Protected Individuals Code).

If the adoptee is over the age of 14, the court is required to obtain his or her consent to the adoption. MCL 710.43(2).

The court must also explain to the adoptee that by consenting to the adoption he or she is consenting to the adoptive parent(s) permanently becoming his or her legal parent(s) as though the adoptee had been born to the adoptive parent(s). MCL 710.44(7).

Investigation. If a parent or guardian consents to adoption, the consent shall not be executed until after an investigation the court considers proper. MCL 710.44(6).

Prior to executing the adoptee's consent, the court must conduct an investigation the court considers proper. MCL 710.44(7).

Best Interests of the Adoptee. MCL 710.51 provides:

> "(1) Not later than 14 days after receipt of the report of investigation, except as provided in subsections (2) and (5),* the judge shall examine the report and shall enter an order terminating the rights of the child's parent or parents, if there was a parental consent, or the rights of any person in loco parentis, if there was a consent by other than parents, and approve placement of the child with the petitioner if the judge is satisfied as to both of the following:
>
> > "(a) The genuineness of consent to the adoption and the legal authority of the person or persons signing the consent.
> >
> > "(b) The best interests of the adoptee will be served by the adoption."

*See Section 8.3 regarding step-parent adoption.

MCL 710.51(2) provides:

> "If it is necessary to hold a hearing before entering an order terminating the rights of a parent, parents, or a person in loco parentis, or if other good cause is shown, the time specified in subsection (1) shall be extended for an additional 14 day period."

The Adoption Code defines the "best interests of the adoptee" in MCL 710.22(f). MCL 710.22(f) provides:

> "'Best interests of the adoptee' or 'best interests of the child' means the sum total of the following factors to be considered, evaluated, and determined by the court to be applied to give the adoptee permanence at the earliest possible date:
>
> "(i) The love, affection, and other emotional ties existing between the adopting individual or individuals and the adoptee or, in the case of a hearing under section 39 of this chapter, the putative father and the adoptee.
>
> "(ii) The capacity and disposition of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, the putative father to give the adoptee love, affection, and guidance, and to educate and create a milieu that fosters the religion, racial identity, and culture of the adoptee.*
>
> "(iii) The capacity and disposition of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, the putative father, to provide the adoptee with food, clothing, education, permanence, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> "(iv) The length of time the adoptee has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> "(v) The permanence as a family unit of the proposed adoptive home, or, in the case of a hearing under section 39 of this chapter, of the putative father.
>
> "(vi) The moral fitness of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, the home of the putative father.
>
> "(vii) The mental and physical health of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, of the putative father and of the adoptee.
>
> "(viii) The home, school, and community record of the adoptee.

*See Section 6.2(B) for information on considerations of age, national origin, or religious affiliation.

> "(ix) The reasonable preference of the adoptee, if the adoptee is 14 years of age or less and if the court considers the adoptee to be of sufficient age to express a preference.
>
> "(x) The ability and willingness of the adopting individual or individuals to adopt the adoptee's siblings.
>
> "(xi) Any other factor considered by the court to be relevant to a particular adoption proceeding, or to a putative father's request for child custody."

If the court denies the consent, the court must state the reasons for the denial on the record or in writing. MCL 710.63.

Verification of Out-of-State or Out-of-Country Consent. MCL 710.44(4) provides:

> "If the consent is executed in another state or country, the court having jurisdiction over the adoption proceeding in this state shall determine whether the consent was executed in accordance with the laws of that state or country or the laws of this state and shall not proceed unless it finds that the consent was so executed."

D. Effect of Consent

Termination of Parental Rights. When the court is satisfied that consent was genuine and the adoption is in the best interests of the adoptee, the court must enter an order terminating the parental rights of the person or agency consenting to the adoption. MCL 710.51(1). However, in the case of a step-parent adoption, the court must not terminate the parental rights of the adoptee's parent who has legal custody of the adoptee. MCL 710.51(5) provides, "If a parent having legal custody of the child is married to the petitioner for adoption, the judge shall not enter an order terminating the rights of that parent."*

*See Section 8.3 regarding of step-parent adoption.

Attached in Appendix B is the SCAO form "Order Terminating Parental Rights After Release or Consent."

Child Becomes a Court Ward. When parental rights are terminated, the child then becomes a court ward, except in two circumstances. MCL 710.51(3) provides:

> "Upon entry of an order terminating rights of parents or persons in loco parentis, a child is a ward of the court . . . . If the petitioner for adoption is married to the parent having legal custody of the child, the child shall not be made a ward of the court after termination of the rights of the other parent."

Instead of making the child a court ward and placing the child outside of the home, the child would remain in the home of the parent who has legal custody of the child and the child would not become a court ward.

The second exception is provided in MCL 710.51(4), which deals with children placed for adoption in Michigan by an agency of another state or country. That statute states:

> "Without making the child a ward of the court, the court may approve placement of a child if the child is placed for adoption in this state by a public or licensed private agency of another state or country and if the law of the sending state or country prohibits the giving of consent to adoption at the time of placement. . . ."

Terminate Jurisdiction of the Court. The order terminating parental rights also terminates the jurisdiction of the court over the child in a divorce or separate maintenance action. MCL 710.51(3).

2.7 Withdrawal of Consent

Consent for adoption may not be withdrawn once the court enters an order terminating the rights of the parent, guardian, court, FIA, or child placing agency. MCL 710.51(3).

**Brown v DeWitt* predates the Adoption Code. However, one of the purposes of the Adoption Code is to provide for the "best interests of the adoptee." See Sections 1.3 and 1.4.

The court has discretion to allow revocation of consent. In *Brown v DeWitt*, 320 Mich 156, 164 (1948), the court denied a petitioner's request to revoke consent even though the motion was timely because the interests of the child are the paramount concern of the court. The Supreme Court held that if the revocation is not in the best interests of the child, then it should be denied. 320 Mich at 164.*

A "change of mind" cannot justify a revocation of consent *after* an adoption has been finalized. *In re Allon*, 356 Mich 586, 591 (1959).

In *In re Nord*, 149 Mich App 817, 821 (1986), a mother consented to the adoption of her child. Shortly after the adoption was finalized, the mother filed a petition to set aside her consent, the order terminating her parental rights, and the adoption. The mother claimed the consent should be set aside because it was procured through fraud. The lower court denied her petition and she appealed. The Court of Appeals held, that in order to establish fraud, the petitioner would have to prove all of the following:

- the adoptive parents made a material representation,
- the representation was false,
- the representation was made recklessly, without any knowledge of its truth,

- the representation was made with the intention that respondent act upon it, and petitioner acted in reliance upon it, and
- the respondent suffered injury. 149 Mich App at 821.

The Court of Appeals upheld the lower court's denial of the petition and indicated that the mother failed to prove the consent was induced by fraud. 149 Mich App at 821.

2.8 Rehearing on a Consent to Adoption

MCL 710.64 provides:

> "(1) Upon the filing of a petition in court within 21 days after entry of any order under this chapter, and after due notice to all interested parties, the judge may grant a rehearing and may modify or set aside the order.
>
> "(2) The court shall enter an order with respect to the original hearing or rehearing of contested matters within 21 days after the termination of the hearing or rehearing."

A parent who has consented to the adoption of his or her child may file, within 21 days of the order, a motion to set aside the order terminating parental rights that was entered as a result of his or her consent. The court's findings on a rehearing may be appealed to the Court of Appeals pursuant to MCL 710.65, quoted in Section 2.2(D), above.

A. Filing, Notice, and Response

MCR 3.806(A) provides:

> "A party may seek rehearing under MCL 710.64(1) by timely filing a petition stating the basis for rehearing. Immediately upon filing the petition, the petitioner must give all interested parties notice of its filing in accordance with MCR 5.105. Any interested party may file a response within 7 days of the date of service of notice on the interested party."

MCR 5.105 provides that service on an interested person may be made by personal service, by registered, certified or ordinary mail, or if the interested person's address or whereabouts are unknown, by publication pursuant to MCR 5.114(B). If an interested party is incarcerated, see Section 2.16 for the notice provisions for an incarcerated party.

B. Procedure for Determining Whether to Grant a Rehearing

MCR 3.806(B) provides: "The court must base a decision on whether to grant a rehearing on the record, the pleading filed, or a hearing on the petition. The court may grant a rehearing only for good cause. The reasons for its decision must be in writing or stated on the record."

C. Procedure if Rehearing Is Granted

MCR 3.806(C) provides: "If the court grants a rehearing, the court may, after notice, take new evidence on the record. It may affirm, modify, or vacate its prior decision in whole or in part. The court must state the reasons for its action in writing or on the record."

D. Stay of Proceedings

MCR 3.806(D) provides: "Pending a ruling on the petition for rehearing, the court may stay any order, or enter another order in the best interest of the minor."*

*See Section 1.4 for information regarding the "best interests" of a minor.

2.9 Withholding Consent

If the petitioner for adoption is unable to obtain the consent of the FIA, a child placing agency or the court or tribunal where the child is a permanent ward, the petitioner may file a motion with the court. MCL 710.45(2) provides:

> "If an adoption petitioner has been unable to obtain the consent required by section 43(1)(b), (c), or (d) of this chapter, the petitioner may file a motion with the court alleging that the decision to withhold consent was arbitrary and capricious. . . ."

The consent of the FIA or a child placing agency is necessary where the child has been released by the parent(s) or guardian to the FIA or the child placing agency. The FIA must also consent to the release where the child has been permanently committed to the custody of the FIA. MCL 710.43(1)(b) and (d).

The consent of the court or the tribal court becomes necessary when the court or tribal court having jurisdiction over the child has permanent custody of the child. MCL 710.43(1)(c).

A. Motion to Determine if Arbitrary and Capricious

When the necessary party refuses to provide consent, a motion may be filed by the petitioner alleging the denial of consent was arbitrary and capricious. MCL 710.45(2). The motion must contain the following:

> "(a) The specific steps taken by the petitioner to obtain the consent required and the results, if any.
>
> "(b) The specific reasons why the petitioner believes the decision to withhold consent was arbitrary and capricious." MCL 710.45(2)(a)–(b).

Typically a motion filed pursuant to MCL 710.45(2) comes before the court when there are competing parties to the adoption. For example, MCI has permanent custody of a child and it consents to the child's adoption by the foster parents. During that same time period, the child's grandparents request consent to adopt and they are denied. In this situation, the grandparents may file a motion asking the court to determine whether the denial of consent was arbitrary and capricious.

The Michigan Supreme Court in *Bundo v Walled Lake*, 395 Mich 679, 703, n17 (1976), citing the United States Supreme Court in *United States v Carmack*, 329 US 230, 243 (1946), defined "arbitrary" and "capricious" as follows:

> "Arbitrary is: '[W]ithout adequate determining principle . . . . Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned.'"
>
> "Capricious is: '[A]pt to change suddenly; freakish; whimsical; humorsome.'"

MCL 710.45(3) limits when a motion to determine if consent was arbitrarily and capriciously withheld may be filed. MCL 710.45(3) provides:

> "If consent has been given to another petitioner and if the child has been placed with that other petitioner pursuant to an order under [MCL 710.51], a motion under this section shall not be brought after either of the following:
>
> > "(a) Fifty-six days following the entry of the order placing the child.
> >
> > "(b) Entry of an order of adoption."

MCL 710.45(4) provides upon the filing of a petition to adopt a child and a motion to determine if consent was arbitrarily and capriciously withheld, "the court may waive or modify the full investigation of the petition provided in [MCL 710.46].* The court shall decide the motion within 91 days after the filing of the motion unless good cause is shown."

*See Section 5.5 regarding the investigation required by MCL 710.46.

If the court's consent to adoption was required, then the motion shall be heard by a visiting judge. MCL 710.45(7).

The petitioner must establish by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious. MCL 710.45(5).

B. Disposition

If the petitioner fails to demonstrate by clear and convincing evidence that the action was arbitrary and capricious, then the court *must* deny the motion and dismiss that petitioner's petition for adoption. MCL 710.45(5).

On the other hand, MCL 710.45(6) provides:

> "If the court finds by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious, the court may terminate the rights of the appropriate court, child placing agency, or [FIA] and may enter further orders in accordance with this chapter or section 18 of chapter XIIA as the court considers appropriate. In addition, the court may grant to the petitioner reimbursement for petitioner's cost of preparing, filing, and arguing the motion alleging the withholding of consent was arbitrary and capricious, including a reasonable allowance for attorney fees."

If the court denies the motion, the court must state the reasons for the denial on the record or in writing. MCL 710.63.

When the court makes a determination regarding whether the denial of consent was arbitrary and capricious, the judge must not substitute his or her judgment for that of the person or agency withholding consent. The court is not reviewing the decision to decide if it was the "correct" decision, but should focus on whether the decision was arbitrary and capricious. *In re Cotton*, 208 Mich App 180, 184 (1994).

2.10 Special Considerations for Fathers in Consent Proceedings

Legal, biological, and/or putative fathers may be involved in adoption proceedings. Chapter 3 covers the topic of identifying a father and the procedures associated with that process. However, there are specific provisions regarding fathers that apply when a mother is going to consent to an adoption.

Notice of Intent to Consent. Prior to the birth of a child "out of wedlock," a mother may file an ex parte petition seeking a notice of intent to consent to the adoption of the expected child. MCL 710.34(1). The purpose of the notice of intent to consent is to provide a putative father with the earliest possible notice and to facilitate the early placement of the child for adoption. MCL 710.34(1).

Under MCL 710.34(1), the ex parte petition must be verified and contain the following information:

- The approximate date and location of conception of the child and the expected date of the mother's confinement.
- The alleged putative father or fathers.
- A request for the court to inform the putative father of his right to file a notice of intent to claim paternity before the birth of the child and inform the putative father of the rights to which his filing of a notice of intent to claim paternity will entitle him under MCL 710.33.*

*See Section 3.5 for information regarding the rights of a putative father pursuant to MCL 710.33.

Attached in Appendix B is the SCAO form "Petition to Issue Notice of Intent to Release or Consent."

Under MCL 710.34(2), upon the filing of the petition, the court shall issue a notice of intent to consent, which contains the following information:

- The approximate date and location of the conception of the child and the expected date of the mother's confinement.
- The putative father's right to file a notice of intent to claim paternity before the child's birth.
- The putative father's rights to which his filing of a notice of intent to claim paternity will entitle him under MCL 710.33(3).
- Notice to the putative father that failing to file a notice of intent to claim paternity before the expected date of confinement or before the birth of the child, whichever is later, has the following consequences:

  1) it waives his right to receive the notice to which he would otherwise be entitled, and

  2) it constitutes a denial of his interest in custody of the child, which will result in the termination of his parental rights to the child.

The form and notice of the intent to consent must be approved by the State Court Administrator pursuant to MCL 710.36(3). The approved form is attached in Appendix B.

The notice of intent to consent shall be served upon the putative father by any officer or person authorized to serve process by the court, and a proof of service shall be filed with the court. MCL 710.34(1) and MCR 3.802(A)(1).

If the father is served with a notice and does not respond, it is the only notice of the proceedings that he is entitled to receive. MCL 710.34(2)(d).

*See Section 3.2 for a detailed discussion of the due process rights of fathers.

A putative father who has not taken the necessary steps to establish a relationship with the child is entitled to less due process, including notice. *Lehr v Robertson*, 463 US 248, 267-68 (1983).*

2.11 Termination of Parental Rights

The court may enter an order terminating a parent's rights to his or her child and if both parents' rights are terminated, the court frees that child for adoption. The court may terminate parental rights pursuant to either the Adoption Code or the Juvenile Code.

When the state seeks involuntary termination of parental rights, a parent is entitled to an attorney, and if the parent is indigent, the court must appoint an attorney to represent him or her. *Reist v Bay Circuit Judge*, 396 Mich 326, 346 (1976) and *In re Jackson,* 115 Mich App 40, 51 (1982). The court has discretionary authority to appoint counsel to assist an indigent noncustodial parent in contesting termination of parental rights under the Adoption Code. *In re Sanchez*, 422 Mich 758, 761(1985). In *Sanchez,* the Michigan Supreme Court provided that when exercising its discretion,

> "the trial court will be guided by the principle of assuring the nonconsenting parent the ability to present a case properly, measured in the particular case by factors such as the relative strength of the adversaries and the presence or absence of legal, factual, procedural, or evidentiary complexity." 422 Mich at 770-71.

*See Section 3.2 for more information on due process and equal protection.

Due Process* Considerations in Termination of Parental Rights.

- ***Stanley v Illinois*, 405 US 645 (1972)**

The father of an illegitimate child is entitled to a hearing regarding his fitness as a parent before his child may be removed from his care. Denying the father of an illegitimate child a hearing that is granted to all other parents whose children may be removed from their care is a violation of due process and equal protection. 405 US at 649-50. In *Stanley*, the children's father was not married to the mother but they resided together and cared for the children. The mother died and the state removed the children from the father's care based upon an Illinois law which presumed that an unmarried father was an unfit parent. The United States Supreme Court found that classifying the unmarried father as unfit and removing the children from his care, when all other parents are entitled to a hearing prior to the removal, was a violation of due process and equal protection guaranteed by the United States Constitution.

- ***Caban v Mohammed*, 441 US 380 (1979)**

Due process and equal protection also prohibit the state from terminating the parental rights of an unmarried father without the showing of unfitness that is

required to terminate the parental rights of an unmarried mother. 441 US at 393-94. In *Caban*, the mother and father of two children resided together but never married. When they separated, the mother retained custody of the children, and the father continued to visit them on a weekly basis. When the father kept the children after a visit, the mother initiated a custody proceeding. The court granted temporary custody to the mother and her new husband and gave the father and his new wife visiting rights. The mother and her new husband then filed a petition for the new husband to adopt both of the children. The father objected and joined with his new wife in filing a cross-petition for step-parent adoption. At that time, the New York law governing adoptions provided that a mother must consent to the adoption of her child "born out of wedlock." However, a father's consent to adoption of his child "born out of wedlock" was not necessary. 441 US at 382-87. After a hearing where both parties presented evidence, the trial court granted the mother's petition for adoption, thereby cutting off all of the father's parental rights. The trial court indicated that the father's adoption petition could not be granted unless the mother consented to the adoption. The father appealed claiming the distinction under New York law between the adoption rights of an unwed father and those of other parents violated equal protection. Upon hearing the case, the United States Supreme Court held the classification discriminated against unwed fathers even when their identity is known and they have manifested a significant interest in the child. The Supreme Court held that the statute violated the Equal Protection Clause. 441 US at 394.

- ***Lehr v Robertson,* 463 US 248 (1983)**

In *Lehr,* Lorraine Robertson (Robertson) and Jonathan Lehr (Lehr) had a child "born out of wedlock." Eight months after the child's birth, Robertson married Richard Robertson. When the child was over two years old, the Robertsons filed a petition for step-parent adoption. On March 7, 1979, the court entered an order of adoption. Lehr appealed the entry of that order, claiming that he was entitled to notice of the adoption proceeding.

The state of New York maintains a "putative father registry"* that allows a man who wishes to claim paternity of a child "born out of wedlock" to register and be entitled to notice of any proceedings for the child's adoption. 463 US at 250-51. Although Lehr claimed to be the child's father, he failed to register. New York law required notice of adoption proceedings to be given to registered fathers as well as several other classes of fathers of children "born out of wedlock." However, Lehr admitted that he did not register or fall under any of the other classes of fathers entitled to notice under the law. Lehr claimed that because he filed a "visitation and paternity petition" one month after the adoption proceedings were commenced in a different county, he was entitled to notice and a hearing. 463 US at 252. Lehr also claimed that the gender-based classification in the statute, which denied him the right to consent to the child's adoption and accorded him fewer procedural rights than her mother, violated the Equal Protection Clause. 463 US at 255.

*See Section 3.5 for Michigan's version of the "putative father registry."

The United States Supreme Court distinguished between an unwed father who has established a relationship with a child and one who has not established a relationship. The Court indicated:

> "The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie." 463 US at 262.

The United States Supreme Court indicated that the state has a legitimate interest in facilitating the adoption of young children in an expeditious manner. The Court found the father's argument merely an attack on the notice provisions of the statute. Further, the Court provided that the Constitution does not require a trial judge to give special notice to a nonparty who is presumptively capable of asserting his or her own rights. 463 US at 265.

The Court also indicated that the father's equal protection argument must fail. In so finding the Court indicated:

> "If one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a State from according the two parents different legal rights." 463 US at 267-68.

Lehr had never taken care of the child or established any relationship with the child. The Supreme Court affirmed the decision of the lower court that approved the adoption of the child. 463 US at 268.

- ***In re BKD*, 246 Mich App 212 (2001)**

*See Section 2.12(C) for information on MCL 710.39.

In *BKD*, a father challenged his classification under MCL 710.39* as a father who failed to establish a custodial or support relationship with his child. The father argued that MCL 710.39 violated due process and equal protection. The father indicated that he was denied the opportunity to establish a custodial or support relationship with the child because immediately after the child's birth, the child was placed with an adoptive family. The father also indicated that he did not request custody after the child's birth because he wanted a paternity test to determine whether or not he was the child's father.

The Court of Appeals held that the father was not denied the opportunity to establish a custodial or support relationship. The Court pointed out that paternity is often in question when a child is placed for adoption, but the fact that a father is unsure of paternity does not prevent him from establishing a relationship with the child or providing support for the child. 246 Mich App

at 222-25. The Court also found that MCL 710.39(2) did not violate due process or equal protection. The Court indicated that MCL 710.39(2) was consistent with the holdings in both *Stanley* and *Caban*, in that fathers who have established a relationship with their child(ren) are afforded the higher standard for terminating parental rights that applies to mothers and married fathers. 246 Mich App at 222. A showing of unfitness as a parent prior to the termination of parental rights must be afforded to fathers who have established a relationship. However, fathers who have not established a relationship are only subject to the "best interests" of the child standard.* 246 Mich App at 222.

*See Section 1.4 for the "best interest" factors.

- ***In re RFF*, 242 Mich App 188 (2000)**

In *RFF*, a father challenged the termination of his parental rights pursuant to MCL 710.39(1) on the grounds that it violated the equal protection clauses of the Michigan and United States Constitutions. 242 Mich App at 204. The father argued that fathers whose children are subject to adoption may have their parental rights terminated pursuant to MCL 710.39 while fathers whose children are not subject to adoption may only have their rights terminated pursuant to MCL 712A.19b of the Juvenile Code. The distinction between MCL 710.39 and MCL 712A.19b is significant because MCL 710.39 only requires a showing that it is in the child's best interest to terminate a father's parental rights. However, the Juvenile Code requires clear and convincing evidence that a statutory ground for termination has been proven. Once that occurs, the court must terminate parental rights unless it is clearly not in the child's best interests to do so. The Court of Appeals found the difference in treatment between unwed fathers whose children are subject to adoption and unwed fathers whose children are not placed for adoption was rationally related to the state's legitimate interest in providing for the welfare of children. 242 Mich App at 208.

The father also challenged MCL 710.39 on the grounds that it violated equal protection because unwed mothers were not subject to a determination of the best interests of a child prior to being awarded custody of a child. The Court of Appeals rejected this claim and provided that mothers and fathers of children "born out of wedlock" are not similarly situated. The Court indicated that by the time a child is born, a mother has already made the decision to give birth to the child and has carried the child for nine months. Therefore, the Court held that the distinction between the treatment of a mother and a father of a child "born out of wedlock" is not a violation of equal protection. 242 Mich App at 210-11.

2.12 Termination Pursuant to the Adoption Code

The Court may terminate a father's parental rights pursuant to MCL 710.37, 710.39, or 710.51 of the Adoption Code.

The court has discretionary authority to appoint counsel to assist an indigent noncustodial parent in contesting a termination of parental rights. *In re Sanchez*, 422 Mich 758, 761 (1985). In *Sanchez,* the Michigan Supreme Court provided that when exercising its discretion,

> "the trial court will be guided by the principle of assuring the nonconsenting parent the ability to present a case properly, measured in the particular case by factors such as the relative strength of the adversaries and the presence or absence of legal, factual, procedural, or evidentiary complexity." 422 Mich at 770-71.

No right to a jury exists for termination of parental rights under the Adoption Code. *In re Colon*, 144 Mich App 805, 819 (1985).

A. Putative Father's Identity and Whereabouts Are Known

Pursuant to MCL 710.37, if the putative father's identity and whereabouts are known, his parental rights to the child may be terminated when the following requirements are met:

1) The putative father was timely served with a notice of intent to release, ***or***

   the putative father was timely served with a notice of intent to consent, ***or***

   the putative father was served with and waived the notice of hearing required for a hearing to identify the father,

   AND

2) the putative father submits a verified affirmation of his paternity and a denial of his interest in custody of the child, ***or***

   the putative father files a disclaimer of paternity, ***or***

   the putative father was served with a notice of intent to release or consent at least 30 days before the expected date of confinement specified in that notice but failed to file an intent to claim paternity either before the expected date of the confinement or before the birth of the child, ***or***

   the putative father was given proper notice of hearing to identify the father and either fails to appear at the hearing or appears and denies his interest in custody of the child. MCL 710.37.

Termination of a putative father's rights pursuant to MCL 710.37(1) occurs when the putative father decides to voluntarily release any rights or claims

that he has to the child or does not take any affirmative steps to claim his rights to the child.

MCR 3.802(A)(2) provides:

> "Notice of a petition to identify a putative father and to determine or terminate his rights, or a petition to terminate the rights of a noncustodial parent, must be served on the individual or the individual's attorney in the manner provided in MCR 5.105(B)(1)(a) or (b)."

MCR 5.105(B)(1)(a) and (b) provide that personal service may be made in the following ways on an attorney or other individuals. MCR 5.105(B)(1)(a)(i)–(iv) provide personal service on an attorney may be made by:

> "(i) handing it to the attorney personally;
>
> "(ii) leaving it at the attorney's office with a clerk or with some person in charge or, if no one is in charge or present, by leaving it in some conspicuous place there, or by electronically delivering a facsimile to the attorney's office;
>
> "(iii) if the office is closed or the attorney has no office, by leaving it at the attorney's usual residence with some person of suitable age and discretion residing there; or
>
> "(iv) sending the paper by registered mail or certified mail, return receipt requested, and delivery restricted to the addressee; but service is not made for purpose of this subrule until the attorney receives the paper."

MCR 5.105(B)(1)(b)(i)–(iii) provides personal service may be made on other individuals by:

> "(i) handing it to the individual personally;
>
> "(ii) leaving it at the person's usual residence with some person of suitable age and discretion residing there; or
>
> "(iii) sending the paper by registered mail or certified mail, return receipt requested, and delivery restricted to the addressee; but service is not made for purpose of this subrule until the individual receives the paper."

If one of the interested parties to the termination is incarcerated, see Section 2.16 for the notice requirements for incarcerated parties.

B. Putative Father's Identity or Whereabouts Are Unknown

MCL 710.37(2) provides:

> "If the identity of the father cannot be determined, or if the identity of the father is known but his whereabouts cannot be determined, the court shall take evidence to determine the facts in the matter. The court may terminate the rights of the putative father if the court finds from the evidence that reasonable effort has been made to identify and locate the father and that any of the following circumstances exist:
>
> > "(a) The putative father, whose identity is not known, has not made provision for the child's care and did not provide support for the mother during her pregnancy or during her confinement.
> >
> > "(b) The putative father, whose identity is known but whose whereabouts are unknown, has not provided support for the mother, has not shown any interest in the child, and has not made provision for the child's care, for at least 90 days preceding the hearing required under [MCL 710.36]."*

*MCL 710.36 governs hearings to identify the father. See Section 3.4.

A putative father's parental rights are terminated pursuant to MCL 710.37(2) in two situations. The first is where the putative father is still unidentified after reasonable efforts have been made to identify him and he has not provided for the child's care and did not provide support for the mother during her pregnancy or confinement. MCL 710.37(2)(a). The second situation arises where the putative father's identity is known but his whereabouts are unknown. In that case, the court may terminate the putative father's rights to the child if the putative father has not shown any interest in the child or made any provisions for the child's care for the 90 days preceding the hearing to identify the father.*

*See Section 3.4 for more information on hearings to identify the father.

Note: MCL 710.37 does not indicate the quality or quantity of support the putative father is to provide. In 1998, amendments were adopted to MCL 710.39 that required that the support be "regular and substantial." However, the legislature did *not* amend MCL 710.37 to include the terms "regular and substantial." Prior to the amendments to MCL 710.39, the courts were often asked to determine what quantity or quality of support should be provided. In *In re Gaipa*, 219 Mich App 80, 86 (1986), the court indicated that when determining if a noncustodial parent has supported the child, the test is whether he or she "provided reasonable support or care under the circumstances of the case." The noncustodial parent must provide more than an "incidental, fleeting, or inconsequential offer of support or care." 219 Mich App at 85. See also *In re Dawson*, 232 Mich App 690, 692-96 (1998), where the Court of Appeals held that a notice of intent to claim paternity by a putative father does not constitute support or care.

Notice to Putative Fathers When Identity or Whereabouts are Unknown. MCR 3.802(B) provides:

> "(1) If service cannot be made under subrule (A)(2)(a)* because the identity of the father of a child born out of wedlock or the whereabouts of the identified father has not been ascertained after diligent inquiry, the petitioner must file proof, by affidavit or by declaration under MCR 2.114(B)(2), of the attempt to identify or locate the father. No further service is necessary before the hearing to identify the father and to determine or terminate his rights.
>
> "(2) At the hearing, the court shall take evidence concerning the attempt to identify or locate the father. If the court finds that a reasonable attempt was made, the court shall proceed under MCL 710.37(2). If the court finds that a reasonable attempt was not made, the court shall adjourn the hearing under MCL 710.36(7) and shall
>
> > "(a) order a further attempt to identify or locate the father so that service can be made under subrule (A)(2)(a), or
> >
> > "(b) direct any manner of substituted service of the notice of hearing except service by publication."

*Subrule (A)(2)(a) does not currently exist. The language of (A)(2)(a) and (A)(2)(b) were incorporated into subrule (A)(2) when the rules were amended in May 2002.

An affidavit or declaration under MCR 2.114(B)(2) is required to be verified by:

> "(a) oath or affirmation of the party or of someone having knowledge of the facts stated; or

"(b) except as to an affidavit, including the following signed and dated declaration: 'I declare that the statements above are true to the best of my information, knowledge, and belief.'" MCR 2.114(B)(2)(a)–(b).

Note: This Section is limited to the notice provisions for termination of a putative father's parental rights. See Section 3.4 for information regarding a hearing to identify the father and the applicable notice provisions.

C. The "Do Nothing" or "Do Something" Putative Father

Putative fathers have been divided into two categories: 1) those who have not established a "custodial relationship" with the child or who have failed to provide substantial and regular support or care to the mother or the child, and 2) those who have established a custodial or support relationship with the child. MCL 710.39 and *In re Baby Boy Barlow*, 404 Mich 216, 229 (1978). The two categories are more often referred to as the "do something" and "do nothing" fathers.

In order to be a "do something" father, a father must take affirmative steps or "do something" to either establish a custodial relationship with the child or provide substantial and regular support or care for the child or the child's mother during pregnancy. On the other hand, a "do nothing" father does not take steps to either establish a custodial relationship with the child or provide for the child or the child's mother during pregnancy.

In *In re Lang*, 236 Mich App 129, 138 (1999), the court indicated that a "custodial relationship" is an established relationship between the parent and the child whereby the parent exercises responsibility for the care, supervision, and upbringing of the child.

D. Terminating Parental Rights of the "Do Something" Putative Father

MCL 710.39(2)* governs the termination of parental rights of "do something" fathers and provides:

*See Section 2.12(F), below, for case law interpreting MCL 710.39.

"If the putative father has established a custodial relationship with the child or has provided substantial and regular support or care in accordance with the putative father's ability to provide such support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings in accordance with [MCL 710.51(6)] or section 2 of chapter XIIA."

A "do something" father's rights may *not* be involuntarily terminated pursuant to the Adoption Code except under the step-parent adoption provision, MCL 710.51(6). The only other means of terminating a "do something" father's rights is through child protective proceedings.*

*See Section 2.13 regarding the termination of parental rights pursuant to a step-parent adoption and Section 2.14 regarding termination of parental rights pursuant to the Juvenile Code.

If the court denies the termination petition, the court must indicate the reasons for the denial on the record or in writing. MCL 710.63.

E. Terminating Parental Rights of the "Do Nothing" Putative Father

MCL 710.39(1)* governs termination of parental rights of "do nothing" fathers and provides:

*See Section 2.12(F), below, for case law interpreting MCL 710.39.

> "If the putative father does not come within the provisions of subsection (2), and if the putative father appears at the hearing and requests custody of the child, the court shall inquire into his fitness and his ability to properly care for the child and shall determine whether the best interests of the child will be served by granting custody to him. If the court finds that it would not be in the best interests of the child to grant custody to the putative father, the court shall terminate his rights to the child."

If the court denies the termination petition, the court must indicate the reasons for the denial on the record or in writing. MCL 710.63.

> **Note:** Pursuant to MCL 710.39(1), when a putative father appears, he must either request custody or deny his interest in custody. See also *In re TMK*, 242 Mich App 302 (2000).

Putative Fathers Awarded Custody. If a petition is filed with the court to terminate the putative father's rights pursuant to MCL 710.39, the court may determine that grounds for termination do not exist, and if the mother's parental rights have been terminated, the court may award custody of the child to the putative father and issue an order legitimating the child. MCL 710.39(3).

F. Case Law Interpreting MCL 710.39(1)–(2)

The above Sections 2.12(C)–(E) discuss the statutory guidelines for termination of parental rights pursuant to MCL 710.39. The following cases interpret MCL 710.39(1) and MCL 710.39(2):

- ***In re Baby Boy Barlow*, 404 Mich 216 (1978)**

The mother gave birth to a child "out of wedlock" and placed the child with an adoption agency for an eventual adoption. The father was notified of the

proceedings and came forward admitting paternity and seeking custody of the child. The trial court terminated the father's parental rights to the child pursuant to MCL 710.39(1) after finding that it would not be in the best interests of the child to award custody to the father. The court also found that the father could not properly care for the child, no emotional ties had developed between the child and his father, the father was not inclined to raise the child in the mother's religion, and it would be in the best interests of the child to be adopted by the foster parents. 404 Mich at 225–26.

The Michigan Supreme Court reversed the lower court's finding that termination was in the best interests of the child and provided the following:

- When determining if an award of custody to the putative father is in the best interests of the child, the court *may* look to MCL 722.23, part of the Child Custody Act, for a list of the factors to be considered. 404 Mich at 236. The Child Custody Act applies to circuit court custody disputes, and although it is not controlling, it may be of some guidance. 404 Mich at 235.*

*Since the Court's holding in *Barlow*, the Adoption Code has been amended to provide its own "best interest factors." See Section 1.4.

- Terminating the rights of a father in favor of an unknown, unidentified, hypothetical third party should not be done in the absence of evidence indicating that the father's home would not be a good one for the child. 404 Mich at 233.

- The religious preference of a child's mother is not a controlling factor in determining whether to terminate the father's rights. 404 Mich at 239.

- The noncustodial parent must be given notice and an opportunity to be heard. 404 Mich at 229.

♦ ***In re Schnell*, 214 Mich App 304 (1995)**

In *Schnell*, the putative father had not established a relationship with the child; however, an income withholding order had been entered and the putative father made regular payments of support. The lower court indicated that this type of support was not of a voluntary nature and was not the type of support and care envisioned in MCL 710.39(2). The Court of Appeals reversed this decision, indicating that the kind and quality of the support is not addressed in the statute and therefore the nature of the support provided is irrelevant. 214 Mich App at 311. The Court held that under MCL 710.39(1) and (2), court-ordered support that is deducted from a father's paycheck is considered support. 214 Mich App at 311.

Note: In 1998, the legislature amended MCL 710.39, by adding the requirement that the support be "regular and substantial."

- ***In re TMK*, 242 Mich App 302 (2000)**

Pursuant to MCL 710.39(1), when a putative father appears, he must either request custody or deny his interest in custody. In *TMK* the putative father objected to the termination of his parental rights pursuant to MCL 710.39(1) but did not request custody of the child. The Michigan Court of Appeals held:

> "The relevant statutory sections contemplate that when a putative father appears he will either request custody, MCL 710.39(1); MSA 27.3178(555.39)(1), or deny his interest in custody, MCL 710.37(1)(a); MSA 27.3178(555.37)(1)(a). Respondent in this case did neither. In our view, in order to properly object to the termination of his rights, MCL 710.39(1); MSA 27.3178(555.39)(1) required respondent to request custody. His failure to do so was therefore tantamount to a denial of interest in custody and permitted the court to terminate his parental rights under MCL 710.37(1)(a); MSA 27.3178(555.37)(1)(a)." 242 Mich App at 305.

- ***In re Kozak*, 92 Mich App 579 (1979)**

A putative father's rights to his son were terminated pursuant to MCL 710.39. The child's mother filed both a release of parental rights and a petition to terminate the parental rights of an unknown putative father so that the child could be placed for adoption. The mother claimed that she did not know the identity of the child's father. After a hearing, the court terminated her parental rights to the child as well as the parental rights of the unknown putative father. Approximately three months after the order of termination was entered, the father filed an acknowledgment of paternity and then filed for a hearing on custody and a stay of the adoption proceedings. The court denied the request for a hearing and indicated that the order terminating parental rights was *res judicata*. The Court of Appeals overturned the decision to deny a hearing and indicated that to be *res judicata* the former adjudication must be between the same parties. Since the father was not a party to the original hearing, he was not barred from litigating the issue of termination of parental rights. The Court of Appeals quoted *In re MacLoughlin*, 82 Mich App 301 (1978):

> "Public policy does favor the certainty and permanence of probate court adoption orders. However, public policy does not favor the securing of such orders by fraud on the petitioner or upon the court. Since fraud upon both the petitioner and the court is alleged by the petitioner, it would appear that the court should at least hear the basis for these claims and inquire into their validity at an appropriate hearing." 92 Mich App at 583.

The Court of Appeals then remanded the case for a hearing pursuant to MCL 710.39. 92 Mich App at 584.

- ***In re Leach*, 373 Mich 148 (1964)**

The adoptive parents petitioned the court to set aside the adoption, which had taken place ten years earlier. The adoptive parents claimed the adoptee was mentally ill and they were never informed of the mental illness. The court denied the petition indicating the adoptee had lived with the adoptive parents for a year prior to the adoption, and there were signs of emotional trouble at that time. The court found that no fraud had occurred. 373 Mich at 153. The court indicated an adoption could be overturned in a case of significant fraud, but the court is extremely reluctant to set aside an adoption proceeding. 373 Mich at 152-53.

- ***In re BKD*, 246 Mich App 212 (2001)**

A father's parental rights were terminated pursuant to MCL 710.39(1), and he claimed that the court erred in terminating his parental rights because the court failed to articulate the considerations for each "best interest" factor. The father indicated that pursuant to MCL 722.23 of the Child Custody Act, and *Daniels v Daniels*, 165 Mich App 221 (1988), the court must make specific findings of fact regarding each best interest factor. The Court of Appeals disagreed with the father and affirmed the lower court's decision. In doing so, the Court of Appeals indicated that the Child Custody Act and *Daniels* did not apply to termination proceedings under the Adoption Code. 246 Mich App at 218. Further, the Court of Appeals indicated that the lower court had discussed all but one factor and, even if it had considered that factor, the outcome of the case would not have been different. 246 Mich App at 221.

Fathers Deceived About Pregnancy.

- ***In re Dawson*, 232 Mich App 690 (1998)**

*See Section 3.5 for more information on filing a notice of intent to claim paternity.

The child's mother told the child's father that he was not the child's father. In December 1997, the adoption agency notified the father that the mother had named him as the child's father. In January 1998, the father filed a notice of intent to claim paternity. The child was born in February 1998 and turned over to adoptive parents. In late February 1998, a hearing was conducted to terminate the father's parental rights. The lower court indicated that the filing of a notice of intent to claim paternity* constitutes support or care for the purpose of MCL 710.39(2). The court denied the termination indicating that the father was an appropriate father under MCL 710.39(1) and the best interests of the child were served by granting custody of the child to the father. The Court of Appeals held that the filing of a notice of intent to claim paternity does *not* constitute support or care for the purpose of MCL 710.39(2). However, the Court found the error was harmless and affirmed the lower court's decision indicating that the father was an appropriate caregiver and the best interests of the child were served by granting custody to the father. 232 Mich App at 695.

- ***In re RFF*, 242 Mich App 188 (2000)**

In *RFF*, the mother and father of RFF were not married at the time RFF was born. At various points in her pregnancy, the mother told the father that she was not pregnant. Approximately three weeks prior to RFF's birth, the mother contacted the father and indicated that she was pregnant. However, she did not provide the expected date of birth. When RFF was born, the mother immediately turned him over to the adoptive parents. Meanwhile, the father was contacted by the adoption agency and he agreed to sign a consent for RFF's adoption. When the father arrived to sign the consent he learned that RFF had been born the day before. Upon discovering this, the father became upset and decided not to sign the consent. The father arranged, through the adoption agency, to visit with the child. At some point, the father asked the adoption agency about "costs" and he was told that cost was not an issue because the adoptive parents were paying all of the costs. The father did not send any money or provide support for RFF. The mother filed a petition to identify the father and determine or terminate his rights. The lower court held a hearing to identify the father and determine or terminate his rights and ordered the father's parental rights terminated pursuant to MCL 710.39(1). The lower court indicated that MCL 710.39(2) did not apply because the father had not provided any "regular and substantial support." The court then analyzed the best interest factors and found the best interests of the child were served by termination of the father's parental rights. In reviewing the best interest factors, the court found the father and child lacked any emotional ties, the father lacked maturity, the permanence of the father's home was uncertain because he was still in high school, and the father's apparent intention was to gain custody of the child and turn RFF over to his parents to raise the child. 242 Mich App at 201-03.

The father appealed the lower court's decision on three grounds. First, the father indicated that the lower court should have applied MCL 710.39(2) and not MCL 710.39(1). Although the father conceded that he did not provide "substantial and regular support," he indicated that as a "deceived father" he was unable to provide support. He claimed that because he was unaware of the mother's pregnancy he could not have provided support during the pregnancy. He further argued that after the child's birth he did not provide support because the adoption agency misled him into thinking that all of the costs had been paid by the adoptive family. The Court of Appeals rejected this argument and indicated that MCL 710.39(2) did not contain a "deceived father" exception. The Court of Appeals provided that although the statute provides that the regular and substantial support must be in "accordance with the putative father's ability to provide such support or care," this language did not anticipate the circumstances of this case. The Court of Appeals rejected the "deceived father" exception to MCL 710.39(2) and indicated:

> "We believe that the Legislature should reexamine §39 and evaluate under which of the existing subsections, subsection 39(1) or subsection 39(2), it is most appropriate to place a father who has been deceived about a pregnancy and whether it is more

> appropriate to create a third subsection to address this specific problem. While this Court may feel that it is unfair to consider such a father under subsection 39(1), the Legislature is the appropriate forum for making these types of policy choices." 242 Mich App at 201.

The father's second argument on appeal was that the lower court erred in finding that it was in the best interests of RFF to terminate his parental rights. The Court of Appeals reviewed the lower court's findings with regard to best interests and indicated that although they may disagree with some of the findings, there was no clear error. 246 Mich App at 219.

The father's final appellate argument was that MCL 710.39 violates both due process and equal protection. The father asserted two separate equal protection claims with regard to MCL 710.39. First, he argued that MCL 710.39(1) violates equal protection because when a child is placed for adoption, an unmarried father's parental rights may be terminated upon a showing that the termination is in the child's best interests, but when the child is not placed for adoption a father's parental rights may only be terminated pursuant to the Juvenile Code, MCL 712A.19b. In order to terminate parental rights under the Juvenile Code, one of the statutory grounds for termination must be proven by clear and convincing evidence; termination of parental rights is then mandatory unless the court finds that termination is clearly not in the child's best interests. On the other hand, under the Adoption Code, the petitioner only has to show that the termination is in the child's best interests. The Court of Appeals rejected this argument. The Court indicated that the state has a legitimate governmental interest in providing for the welfare of children, and when a child is waiting to be adopted, his or her welfare is served by settling disputes regarding a putative father's parental rights as soon as possible. Therefore, MCL 710.39(2) does not violate equal protection. 242 Mich App at 208.

The father also argued that MCL 710.39 violates equal protection because biological mothers and fathers are treated differently before their rights are terminated. There is no inquiry into the best interests of a child when a biological mother wants custody of her child born "out of wedlock." However, a biological father must show that he provided regular and substantial support for the child and that the best interests of the child would be served by placing the child with him. The Court of Appeals rejected this claim and provided that mothers and fathers of children born "out of wedlock" are not similarly situated. The Court indicated that by the time the child is born the mother has already made decision to give birth to the child, has carried the child for nine months and her identity is not in question. Therefore, the Court held that the different treatment of a mother and a father of a child born "out of wedlock" is not a violation of equal protection. 210 Mich App at 211.

The dissent provided by Judge Wilder indicated that the language contained in MCL 710.39(2) provided for a "deceived father" exception. The dissent stated:

> "I would reverse and remand for specific factual findings regarding appellant's ability to provide substantial and regular support or care for appellee or RFF, including findings regarding whether appellant could provide any support and care, much less substantial and regular support and care, where he learned about the imminent birth of RFF only three weeks before delivery; whether the circumstances under which appellant was told about the pending adoption suggested that adoption was a *fait accompli*, adversely affecting the timing of his attempt to provide care or support to RFF. . . ." 242 Mich App at 216.

The dissent indicated that even if the father did not come within the provisions of MCL 710.39(2), he would still reverse because the lower court relied heavily on the father's maturity and plans to have his parents raise the child in determining the child's best interest. The dissent indicated that the father was erroneously prevented from presenting a complete record regarding his ability to parent RFF because of sustained relevancy objections to testimony of the father's dentist, aunt, and pastor regarding his maturity. 242 Mich App at 218.

- ***In re TMK*, 242 Mich App 302 (2000)**

A mother does *not* have a duty to notify a father of the birth of his child. The child in *TMK* was born "out of wedlock," and, according to the father, the mother had indicated to him that she terminated the pregnancy. The mother then married, and she and her new husband filed a petition to adopt the child and terminate the natural father's parental rights. The lower court found that the mother had an obligation to provide the father with notice of the child's birth and denied the petition for adoption. The Michigan Court of Appeals overturned the lower court and found that the lower court had erred in finding that the mother had a duty to notify the respondent of the child's birth. 242 Mich App at 304.

2.13 Termination Pursuant to a Step-Parent Adoption*

*See Section 8.3 for information on step-parent adoptions.

A parent's parental rights to his or her child may be terminated in the course of a step-parent adoption, under the following circumstances:

> "If the parents of a child are divorced, or if the parents are unmarried but the father has acknowledged paternity or is a putative father who meets the conditions in [MCL 710.39(2)], and if the parent having legal custody of the child subsequently marries and that parent's spouse petitions to adopt the child, the court upon notice and hearing may issue an order terminating the rights of the other parent if both of the following occur:
>
> > "(a) The other parent, having the ability to support, or assist in supporting, the child, has failed or neglected to provide regular and substantial support for the child or if a support order has been entered, has failed to substantially

> comply with the order, for a period of 2 years or more before the filing of the petition.
>
> "(b) The other parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for a period of 2 years or more before the filing of the petition." MCL 710.51(6).

A. Notice Provisions

The persons interested in a petition to terminate the rights of the noncustodial parent pursuant to MCL 710.51(6) are the following:

- the petitioner;
- the adoptee, if over 14 years of age; and
- the noncustodial parent. MCR 3.800(B).

MCR 3.802(A)(2) provides that notice of a petition to terminate parental rights of a noncustodial parent must be served on the individual or the individual's attorney in the manner provided in MCR 5.105(B)(1)(a) or (b).

MCR 5.105(B)(1)(a) and (b) provide that personal service may be made in the following ways on an attorney or other individuals. MCR 5.105(B)(1)(a)(i)–(iv) provide personal service on an attorney may be made by:

> "(i) handing it to the attorney personally;
>
> "(ii) leaving it at the attorney's office with a clerk or with some person in charge or, if no one is in charge or present, by leaving it in some conspicuous place there, or by electronically delivering a facsimile to the attorney's office;
>
> "(iii) if the office is closed or the attorney has no office, by leaving it at the attorney's usual residence with some person of suitable age and discretion residing there; or
>
> "(iv) sending the paper by registered mail or certified mail, return receipt requested, and delivery restricted to the addressee; but service is not made for purpose of this subrule until the attorney receives the paper."

MCR 5.105(B)(1)(b)(i)–(iii) provides personal service may be made on other individuals by:

> "(i) handing it to the individual personally;

> "(ii) leaving it at the person's usual residence with some person of suitable age and discretion residing there; or
>
> "(iii) sending the paper by registered mail or certified mail, return receipt requested, and delivery restricted to the addressee; but service is not made for purpose of this subrule until the individual receives the paper."

When a noncustodial parent cannot be located for service of a petition to terminate his or her parental rights, the court rules contain additional requirements. MCR 3.802(C) provides:

> "If service of a petition to terminate the parental rights of a noncustodial parent pursuant to MCL 710.51(6) cannot be made under subrule (A)(2)(b)* because the whereabouts of the noncustodial parent has not been ascertained after diligent inquiry, the petitioner must file proof, by affidavit or by declaration under MCR 2.114(B)(2), of the attempt to locate the noncustodial parent. If the court finds, on reviewing the affidavit or declaration, that service cannot be made because the whereabouts of the person has not been determined after reasonable effort, the court may direct any manner of substituted service of the notice of hearing, including service by publication."

*Subrule (A)(2)(b) does not currently exist. The language of (A)(2)(a) and (A)(2)(b) were incorporated into subrule (A)(2) when the rules were amended in May 2002.

An affidavit or declaration under MCR 2.114(B)(2) is required to be verified by,

> "(a) oath or affirmation of the party or of someone having knowledge of the facts stated; or
>
> "(b) except as to an affidavit, including the following signed and dated declaration: 'I declare that the statements above are true to the best of my information, knowledge, and belief.'" MCR 2.114(B)(2)(a)–(b).

If a parent is incarcerated, see Section 2.16 for the special notice provisions for an incarcerated party.

B. Case Law Interpreting MCL 710.51(6)

The following are important cases interpreting the step-parent adoption statute:

- ***In re ALZ*, 247 Mich App 264 (2001)**

In *ALZ*, the child was born "out of wedlock," and the parties had not established paternity. The father wrote a letter to the mother indicating he wanted to begin visiting his daughter, with whom he had no contact. The mother indicated that she did not think it was in the child's best interest and

maybe he could establish a relationship with the child when the child was older. The mother denied the father access to the child because the father admitted to previously molesting two younger girls. The mother claimed that by allowing him access to his daughter, she would be failing to protect the child. The father then filed a paternity action, claiming he was the father of the child and requesting visitation. Two months after the court issued the order of filiation, the mother filed a petition for a step-parent adoption. The lower court held that the father's letter to the mother and the complaint for paternity were ongoing requests for contact and that the mother's resistance to the requests resulted in the father not having contact with the child. The lower court held that the mother could not benefit from her decision to withhold contact by then using the lack of contact as the grounds for termination of the father's parental rights. The Court of Appeals upheld the lower court's determination that a petitioner-mother could not refuse a respondent-father contact with their child and then use the father's lack of contact against him to support her petition for a step-parent adoption. 247 Mich App at 277.

- ***In re Martyn*, 161 Mich App 474 (1987)**

A father claimed that he did not comply with court-ordered support because he was unable to financially care for himself. The lower court declined to hear the reasons why he failed to comply but determined the evidence supported the assertion that he did not comply with the court-ordered support. The father appealed that ruling and argued that the court must consider the reasons for his non-compliance with the support order. The Court of Appeals held that the lower court has the discretion to disregard a noncustodial parent's reasons for violating a support order when determining if a respondent substantially complied with court-ordered support in a termination hearing pursuant to MCL 710.51(6)(a). 161 Mich App at 480. The father also challenged the lower court's finding that he had substantially failed to visit or communicate with the child. The Court of Appeals held that a noncustodial parent who makes only two visits and one phone call to a child in two years has "substantially failed" to visit, contact, or communicate with the child. 161 Mich App at 482.

- ***In re Halbert*, 217 Mich App 607 (1996)**

The father was imprisoned for the two-year period immediately preceding the filing of a petition for termination under the Adoption Code. The lower court indicated that it "normally" looked to the two years preceding the filing of the petition, but since the father was in prison for both of those years, the court would look to the two years preceding the incarceration. 217 Mich App 609. The Court of Appeals held that the two-year period contained in MCL 710.51(6)(b) extends back two years from the date of the filing of the petition for termination of parental rights and is not extended because of parental incarceration. 217 Mich App 612. See also *In re Hill*, 221 Mich App 683, 689-96 (1997) (a parent's incarceration does not toll the two-year time period, nor does incarceration prevent a noncustodial parent from complying with the contact *and* support requirements of MCL 710.51(6)(a)–(b)) and *In re*

Caldwell, 228 Mich App 116, 120–21 (1998) (MCL 710.51(6) does not contain an "incarcerated parent" exception).

- ***In re Kaiser*, 222 Mich App 619 (1997)**

In *Kaiser*, the noncustodial parent was the child's mother. She failed to keep the Friend of the Court informed of her changes of employment as required in the court order for support. The father argued that was a "substantial failure" of the mother to comply with the court's order of support. The Court of Appeals found a noncustodial parent's failure to provide support and keep the Friend of the Court informed about any changes in employment as ordered by the court constitutes a failure to substantially comply with the court order pursuant to MCL 710.51(6)(a). The mother was also prohibited from visiting her child until she received counseling that was sufficient to ensure that she could safely visit with the child. The mother had sought counseling on several occasions and was currently seeing a counselor. The Court of Appeals held that under MCL 710.51(6)(b) a parent does not "substantially fail" to visit, contact, or communicate with his or her child where a court order prevents such contact until the noncustodial parent receives sufficient counseling and the noncustodial parent has made a good-faith effort to reestablish visitation by attending the court-ordered counseling. 222 Mich App 623-25.

- ***In re Simon*, 171 Mich App 443 (1988)**

In 1984, the parents of a child obtained a divorce, and in the divorce decree the mother was awarded custody, the father was ordered to pay support, and the father was denied visitation "until such time as he showed cause why visitation would be in the child's best interest." 171 Mich App 445. In March 1987, the mother and her new husband filed a petition for step-parent adoption, and the court terminated the father's parental rights because he had not contacted the child or paid child support. The father appealed, claiming he did not communicate with his child because of the provision in the divorce decree denying him visitation until he showed that it would be in the child's best interests. The Court of Appeals upheld the termination of the father's rights, noting that the father did not request visitation or make any effort to locate his child. The Court concluded that the father had "substantially failed" to visit, contact or communicate with his child. 171 Mich App at 449.

- ***In re Hill*, 221 Mich App 683 (1997)**

A father challenged the termination of his parental rights on the grounds that the court considered the best interests of the child,* when no best interest provision exists in regards to termination pursuant to a step-parent adoption. The Court of Appeals held that a court may, because the statute is permissive and not mandatory, consider evidence regarding the best interests of the child when deciding whether to terminate a parent's parental rights under MCL 710.51(6). 221 Mich App at 696. The Court stated,

*See Section 1.4 for information on the "best interest" factors.

> "Section 51(6) states that the [court] *may* issue an order terminating the rights of the parent if the requirements of subsections a and b are both met. Thus, the statute is permissive and not mandatory. [*In re Colon*, 144 Mich App 805, 812 (1985)]. Because the probate court has discretion, it was not error for it to consider the best interests of the child." 221 Mich App at 696. [Emphasis in original.]

C. Grandparent Visitation

During the pendency of a step-parent adoption proceeding, grandparents of the adoptee may seek an order for grandparenting time pursuant to MCL 722.27b (Child Custody Act). MCL 710.60(3).

MCL 722.27b(1) provides:

> "(1) Except as provided in this subsection, a grandparent of the child may seek an order for grandparenting time in the manner set forth in this section only if a child custody dispute with respect to that child is pending before the court. If a natural parent of an unmarried child is deceased, a parent of the deceased person may commence an action for grandparenting time. Adoption of the child by a stepparent under chapter X of Act No. 288 of the Public Acts of 1939, being sections 710.21 to 710.70 of the Michigan Compiled Laws, does not terminate the right of a parent of the deceased person to commence an action for grandparenting time."

A parent of a deceased natural parent may commence an action for grandparent visitation even after the adoption has been ordered. *Jones v Slick,* 242 Mich App 715, 721 (2000).

Note of Caution: Grandparent visitation statutes have been challenged as unconstitutional in several states.* In *Troxel v Granville*, 530 US 57, 64-76 (2000), the United States Supreme Court determined the nonparental visitation statute in Washington state was unconstitutional. The Court found that the Washington statute unconstitutionally infringed upon the fundamental right of parents to make decisions concerning the care, custody, and control of their children. 530 US at 66-67. The Court also stated, "we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter." 530 US at 73. The United States Supreme Court left open the possibility that a nonparental visitation statute could be constitutionally framed.

*See also *Wickham v Byrne*, 518 NE 2d 1037 (1988); *Seagrave v Price*, 79 SW 3d 339 (2002); *Blixt v Blixt*, 774 NE 2d 1052 (2002); and *Herbst v Swan*, 102 Cal App 4th 813 (2002).

In *DeRose v DeRose,* 249 Mich App 388, 395 (2002), the Michigan Court of Appeals found Michigan's grandparent visitation statute, MCL 722.27b, unconstitutional. The Court of Appeals indicated that "the lack of any standards in the Michigan statute beyond 'the best interests of the child,' and specifically the failure of the statute to afford any deference to the custodial parent's decision, renders the Michigan statute unconstitutional as written."

249 Mich App at 395. On October 8, 2002, the Michigan Supreme Court granted application for leave to appeal the above cited Court of Appeals opinion, solely on the issue of whether MCL 722.27b is constitutional. *DeRose v Derose,* 467 Mich 884 (2002).

2.14 Termination Pursuant to the Juvenile Code

A parent's parental rights to his or her child may be terminated pursuant to the Juvenile Code.

The parental rights of a parent to a child may be terminated pursuant to MCL 712A.19b(3), which states as follows:

> "(3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
>
> > "(a) The child has been deserted under any of the following circumstances:
> >
> > > (i) The child's parent is unidentifiable, has deserted the child for 28 or more days, and has not sought custody of the child during that period. For the purposes of this section, a parent is unidentifiable if the parent's identity cannot be ascertained after reasonable efforts have been made to locate and identify the parent.
> >
> > > (ii) The child's parent has deserted the child for 91 or more days and has not sought custody of the child during that period.
> >
> > > (iii) The child's parent voluntarily surrendered the child to an emergency service provider under chapter XII and did not petition the court to regain custody within 28 days after surrendering the child.*
>
> > "(b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:
> >
> > > (i) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.
> >
> > > (ii) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse

*See Section 5.6(6).

failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.

(iii) A nonparent adult's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse by the nonparent adult in the foreseeable future if placed in the parent's home.

"(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

(ii) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

"(d) The child's parent has placed the child in a limited guardianship under section 5205 of the estates and protected individuals code, 1998 PA 386, MCL 700.5205, and has substantially failed, without good cause, to comply with a limited guardianship placement plan described in section 5205 of the estates and protected individuals code, 1998 PA 386, MCL 700.5205, regarding the child to the extent that the noncompliance has resulted in a disruption of the parent-child relationship.

"(e) The child has a guardian under the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8102, and the parent has substantially failed, without good cause, to comply with a court-structured plan described in section 5207 or 5209 of the estates and protected individuals code, 1998 PA 386, MCL 700.5207

and 700.5209, regarding the child to the extent that the noncompliance has resulted in a disruption of the parent-child relationship.

"(f) The child has a guardian under the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8102, and both of the following have occurred:

> (i) The parent, having the ability to support or assist in supporting the minor, has failed or neglected, without good cause, to provide regular and substantial support for the minor for a period of 2 years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for a period of 2 years or more before the filing of the petition.
>
> (ii) The parent, having the ability to visit, contact, or communicate with the minor, has regularly and substantially failed or neglected, without good cause, to do so for a period of 2 years or more before the filing of the petition.

"(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

"(h) The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

"(i) Parental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful.

"(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

"(k) The parent abused the child or a sibling of the child and the abuse included 1 or more of the following:

> (i) Abandonment of a young child.

(ii) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.

(iii) Battering, torture, or other severe physical abuse.

(iv) Loss or serious impairment of an organ or limb.

(v) Life threatening injury.

(vi) Murder or attempted murder.

(vii) Voluntary manslaughter.

(viii) Aiding and abetting, attempting to commit, conspiring to commit, or soliciting murder or voluntary manslaughter.

"(l) The parent's rights to another child were terminated as a result of proceedings under section 2(b) of this chapter or a similar law of another state.

"(m) The parent's rights to another child were voluntarily terminated following the initiation of proceedings under section 2(b) of this chapter or a similar law of another state.

"(n) The parent is convicted of 1 or more of the following, and the court determines that termination is in the child's best interests because continuing the parent-child relationship with the parent would be harmful to the child:

(i) A violation of section 316, 317, 520b, 520c, 520d, 520e, or 520g of the Michigan penal code, 1931 PA 328, MCL 750.316, 750.317, 750.520b, 750.520c, 750.520d, 750.520e, and 750.520g.

(ii) A violation of a criminal statute, an element of which is the use of force or the threat of force, and which subjects the parent to sentencing under section 10, 11, or 12 of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.10, 769.11, and 769.12.

(iii) A federal law or law of another state with provisions substantially similar to a crime or

procedure listed or described in subparagraph (i) or (ii)."

> **Note:** A detailed discussion of termination of parental rights under MCL 712A.19b(3) is beyond the scope of this benchbook. See Miller, *Child Protective Proceedings Benchbook: A Guide to Abuse and Neglect Cases* (MJI, 1999).

Once the court has entered an order of termination of the parental rights of both parents, the child will be placed in the permanent custody of the court. MCL 712A.19b(1). The court may continue the child's placement with a relative if the placement is intended to be permanent, continue the child's placement with a permanent foster family, MCL 712A.19(4), or commit the child to the Michigan Children's Institute (MCI). MCL 400.203.*

*See Section 4.1 for a discussion of jurisdictional issues. See Chapters 5 and 6 for information regarding placements.

A parent may agree to the termination of his or her parental rights under the Juvenile Code, by, in effect entering an admission to a ground for termination. *In re Toler*, 193 Mich App 474, 477 (1992) See Miller, *Child Protective Proceedings Benchbook, Abuse and Neglect Cases,* (MJI 1999), for more information on termination of parental rights pursuant to the Juvenile Code.

> **Note:** A parent's parental rights to a subsequent child may be terminated if that parent has voluntarily released his or her rights to a previous child after initiation of proceedings under the Juvenile Code. See MCL 712A.19b(3)(m).

2.15 Post-Termination Review Hearings in Child Protective Proceedings

MCL 712A.19c requires the court to conduct post-termination review hearings in child protective proceedings. At post-termination review hearings, the court shall review all of the following:

> "(a) The appropriateness of the permanency planning goal for the child.
>
> "(b) The appropriateness of the child's placement in foster care.
>
> "(c) The reasonable efforts being made to place the child for adoption or in other permanent placement in a timely manner." MCL 712A.19c(1)(a)–(c).

Post-termination review hearings only apply to cases where parental rights are terminated pursuant to proceedings under the Juvenile Code. MCL 712A.19c(2).

The court continues to review the case as long as the child is under the jurisdiction, control, or supervision of the court, MCI, or another agency. MCL 712A.19c(2), MCL 400.203(a), and MCR 3.978(A). The court may "enter such orders as it considers necessary in the best interests of the child." MCR 3.978(C). The court in the child protective proceeding may terminate its jurisdiction "when a court of competent jurisdiction enters an order terminating the rights of the entity with legal custody and enters an order placing the child for adoption." MCR 3.978(D).

A foster parent may appeal to the Foster Care Review Board and the MCI Superintendent a change in the placement of a child under the jurisdiction, control, or supervision of MCI. See MCL 712A.13b.

2.16 Special Notice Provisions for Incarcerated Parties

MCR 2.004 requires specific actions be undertaken in cases involving incarcerated parties. MCR 2.004 applies to domestic relations actions involving minor children, and other actions involving the custody, guardianship, neglect, or foster-care placement of minor children, or the termination of parental rights, in which a party is incarcerated under the jurisdiction of the Department of Corrections. MCR 2.004(A)(1)–(2).

Responsibility of the Party Seeking an Order. Under MCR 2.004(B), a party seeking an order regarding a minor child must do the following:

> "(1) contact the department to confirm the incarceration and the incarcerated party's prison number and location;
>
> "(2) serve the incarcerated person with the petition or motion seeking an order regarding the minor child, and file proof with the court that the papers were served; and
>
> "(3) file with the court the petition or motion seeking an order regarding the minor child, stating that a party is incarcerated and providing the party's prison number and location; the caption of the petition or motion shall state that a telephonic hearing is required by this rule." MCR 2.004(B)(1)–(3).

Responsibility of the Court. Once a party has completed the foregoing requirements to the court's satisfaction, MCR 2.004(C) requires the court to:

> "issue an order requesting the department, or the facility where the party is located if it is not a department facility, to allow that party to participate with the court or its designee by way of a noncollect and unmonitored telephone call in a hearing or conference, including a friend of the court adjudicative hearing or meeting. The order shall include the date and time for the hearing, and the prisoner's name and prison identification number, and shall be

served by the court upon the parties and the warden or supervisor of the facility where the incarcerated party resides."

The purpose of this telephone call is to determine the following:

> "(1) whether the incarcerated party has received adequate notice of the proceedings and has had an opportunity to respond and to participate,
>
> "(2) whether counsel is necessary in matters allowing for the appointment of counsel to assure that the incarcerated party's access to the court is protected,
>
> "(3) whether the incarcerated party is capable of self-representation, if that is the party's choice,
>
> "(4) how the incarcerated party can communicate with the court or the friend of the court during the pendency of the action, and whether the party needs special assistance for such communication, including participation in additional telephone calls, and
>
> "(5) the scheduling and nature of future proceedings, to the extent practicable, and the manner in which the incarcerated party may participate." MCR 2.004(E)(1)–(5).

Documentation and Correspondence to Incarcerated Party. MCR 2.004(D) requires all court documents or correspondence mailed to the incarcerated party to include the name and prison number of the incarcerated party on the envelope.

Denial of Relief and Sanctions. If the petitioner fails to comply with the requirements of MCR 2.004, the court must deny the petition. MCR 2.004(F)–(G) provide:

> "(F) A court may not grant the relief requested by the moving party concerning the minor child if the incarcerated party has not been offered the opportunity to participate in the proceedings, as described in this rule. This provision shall not apply if the incarcerated party actually does participate in a telephone call."
>
> "(G) The court may impose sanctions if it finds that an attempt was made to keep information about the case from an incarcerated party in order to deny that party access to the courts."